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TRANSCRIPT OF RECORD

304-371

Supreme Court of the United States

OCTOBER TERM, 1942

No. 781

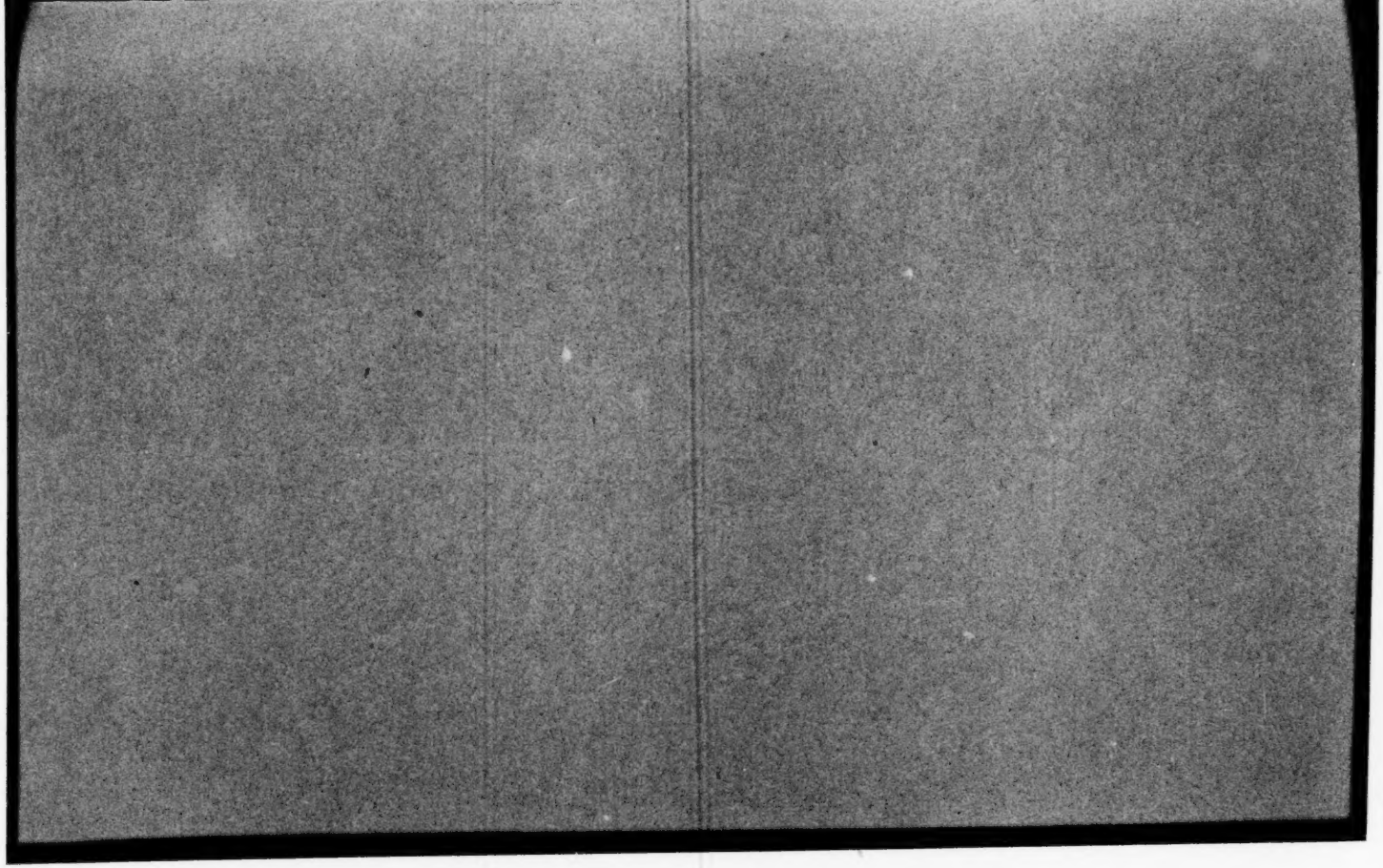
SOUTH MERCUR MINING COMPANY, PETITIONER,

vs.

NEW MERCUR MINING COMPANY AND THE SNYDER MINES, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

FILED MARCH 3, 1943.



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[fol. 1]

IN THE DISTRICT COURT, IN AND FOR TOOELE COUNTY, STATE OF UTAH

NEW MERCUR MINING COMPANY, a Corporation, and THE SNYDER MINES INCORPORATED, a Corporation, Plaintiffs,

vs.

SOUTH MERCUR MINING COMPANY, a Corporation, Defendant

AMENDED COMPLAINT

Come now the plaintiffs, leave of court being first had and obtained, and file this amended complaint and for cause of action against the defendant above named, allege as follows:

1. That each of the plaintiffs and the defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah.

2. That the New Mercur Mining Company, one of the plaintiffs, subject to the paramount title of the United States Government and the lease and option granted to The Snyder Mines Incorporated, the other plaintiff, as herein set out, was from March 1931, and now is, the owner and in possession of the following described lode mining claims, situate in the Camp Floyd Mining District, Tooele County, Utah, namely: Violet Ray Nos. 1 to 12, both inclusive.

3. That on the 28th day of August, 1939, the New Mercur Mining Company, executed and delivered to The Snyder [fol. 2] Mines Incorporated, a lease on the said Violet Ray Nos. 1 to 12 lode mining claims and other lode mining claims owned by it and contiguous thereto, and under said lease agreement granted to said lessee a four-year lease thereon and the possession thereof, with the right to prospect for and develop and mine minerals therefrom and with the duty to perform, in accordance with said contract, the annual assessment work for said Violet Ray Nos. 1 to 12 lode mining claims and with the right to purchase all of said lode mining claims and, pursuant to the terms of said lease and option, the Snyder Mines Incorporated entered into possession of all of said leased lode mining claims on the

28th day of August, 1939, and since said date has been, and now is, in possession thereof.

4. That the defendant claims an estate or interest in said property adverse to the plaintiffs; that the claim of said defendant is without any right whatever and that the said defendant has not any estate, right, title, or interest whatever in the area included within said claims, or any part thereof.

5. That the defendant has wrongfully entered upon the said Violet Ray mining claims, hereinabove described, or some of them, and has extracted and removed ore therefrom, and the plaintiffs are informed and believe and therefore allege that unless restrained it will, pending the trial of this action, continue to wrongfully enter upon said mining claims and extract and remove ore therefrom to the irreparable damage of the plaintiffs.

Wherefore, plaintiffs pray:

(1) That the defendant be required to set forth the nature of its claim, and that by a decree herein it be declared and adjudged that said defendant has no estate or interest whatever in or to the area embraced in said mining claims, or any of them.

[fol. 3] (2) That the title of the plaintiffs is a good and valid one, subject to the paramount title of the United States Government.

(3) That the defendant be restrained and enjoined, pending the trial of this action, from entering upon the said mining claims, or any of them, and extracting and removing ore therefrom, and that at the trial of this action said injunction be made permanent.

(4) That the plaintiffs have such other and further relief as may be just and equitable in the premises and that it recover its costs herein expended.

Allen T. Sanford, Herbert Van Dam, J. H. Morgan,
Attorneys for Plaintiffs.

Duly sworn to by J. H. Marshall. Jurat omitted in printing.

Received copy of the foregoing Amended Complaint this 28th day of December, 1939.

Senior & Senior, Attorneys for Defendant.

[fol. 4] IN THE DISTRICT COURT, IN AND FOR TOOELE COUNTY

[Title omitted]

ANSWER TO AMENDED COMPLAINT AND COUNTERCLAIM

Comes now the Defendant and answering the Amended Complaint of the Plaintiff filed herein:

1. Admits the allegations of paragraph numbered 1 of Plaintiffs' Amended Complaint.

2. Denies that the Plaintiff, New Mercur Mining Company, subject to the paramount title of the United States Government or to a lease and option granted to the Plaintiff, The Snyder Mines, Incorporated, or otherwise ever was or now is the owner of or in possession of or entitled to the possession of the alleged lode mining claims described in paragraph numbered 2 of Plaintiffs' Amended Complaint, namely, Violet Ray Nos. 1 to 12, inclusive, or any of them or any part or parts thereof or of the areas covered thereby or any part or parts thereof. Alleges that the said alleged Violet Ray Nos. 1 to 12, inclusive, lode mining claims, and each of them, have not now and never had any valid existence as mining claims.

[fol. 5] 3. Alleges that the Defendant has no knowledge, information or belief as to the purported lease and option alleged by the Plaintiffs to have been on August 28, 1939 executed and delivered by the Plaintiff, New Mercur Mining Company, to the Plaintiff, The Snyder Mines Incorporated, or as to the terms or conditions of the said purported lease and option, and the Defendant, therefore, denies each and every allegation of paragraph numbered 3 of Plaintiffs' Amended Complaint in regard to the execution or delivery or terms or conditions of the said purported lease and option. Denies that the Plaintiff, The Snyder Mines, Incorporated, on the 28th day of August, 1939, entered into possession of all or any part of the property purportedly included within the said alleged Violet Ray Nos. 1 to 12, inclusive, lode mining claims, and denies that the said Plaintiff, The Snyder Mines Incorporated, since the said date ever has been or now is in possession of the said property or any part thereof.

4. Admits that the Defendant claims an estate and interest in the property and area purportedly covered by the

said alleged Violet Ray Nos. 1 to 12, inclusive, lode mining claims, and admits that the Defendant's claim is adverse to the Plaintiffs, and each of them, but denies that the Defendant claims any interest under or by virtue of the said alleged Violet Ray Nos. 1 to 12, inclusive, locations. Denies that the claim of the Defendant is without right and denies that the Defendant has not any estate, right, title or interest in the area included within said claims, or any part thereof.

5. Admits that the Defendant entered upon the area purportedly embraced within said alleged Violet Ray Nos. 1 to 12, inclusive, lode mining claims, hereinabove mentioned, and that the Defendant has extracted and removed ore therefrom. Denies that the said entry of the Defendant [fol. 6] upon the area embraced within the said claims or any part thereof was wrongful or in violation of any right of the Plaintiffs, or either of them, or that the extraction or removal of ore by the Defendant was wrongful or in violation of any right of the Plaintiffs, or either of them. Admits that unless restrained Defendant will continue in its possession of, and to enter upon said area, and to mine and remove ore therefrom. Denies that the said continued possession or delay or mining or removal of ore by the Defendant will be wrongful or in violation of any right of the Plaintiffs, or either of them, or will result in any damage to the Plaintiffs, or either of them, irreparable or otherwise.

6. Further answering the said Amended Complaint, the Defendant:

A. Alleges that the Plaintiffs failed and neglected to perform labor and make improvements worth $100.00 upon or for the benefit of each or any of the said Violet Ray Nos. 1 to 12 lode mining claims for the assessment period ending, as extended by Act of Congress, at 12:00 o'clock Meridian on the first day of September, A. D., 1939.

B. Alleges that the Defendant after 12:00 o'clock Meridian on the said first day of September, 1939, located the Protection Nos. 4 and 7 to 15, inclusive, lode mining claims in Camp Floyd Mining District, Utah County, State of Utah, under and by virtue of, and in full compl*a*ince with the laws of the United States and the State of Utah and the local rules and customs of miners in said mining district. Alleges that the Defendant at the time of such locations erected

upon each of its said mining claims a monument and posted thereon its notice of location which contained the name of [fol. 7] the claim, name of locator, date of location, number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein or lode as near as may be, and a description of the claim located by reference to natural objects or permanent monuments which identified the claim. Alleges that the Defendant thereafter and with diligence and within thirty days marked the boundaries of each of the said claims on the ground so that the said boundaries can be readily traced. Alleges that within thirty days after the posting of the said notices of location upon the said claims as aforesaid, the Defendant filed for record in the office of the County Recorder of Tooele County, in which said claims are situated, a substantial copy of each of the said notices of location. Alleges that at the time of, or prior to the making the said location as aforesaid, the Defendant discovered upon each of the said claims a vein or lode of quartz or other rock in place bearing gold and other valuable mineral.

C. Alleges that the said Protection Nos. 4 and 7 to 15 lode mining claims embrace and include the area purportedly included within the said alleged Violet Ray Nos. 1 to 12 locations.

D. Alleges that by reason of the aforesaid failure and neglect of the Plaintiffs to perform the required annual assessment labor upon or for the benefit of the said purported Violet Ray Nos. 1 to 12 locations or any of them, and by reason of the aforesaid location by the defendant of the said Protection Nos. 4 and 7 to 15 lode mining claims, all and whatever interest, claim or right the Plaintiffs may have [fol. 8] had under the said alleged Violet Ray Nos. 1 to 12 locations and each of them, in or to all and every part of the area covered by said Protection Nos. 4 and 7 to 15 lode mining claims, was wholly forfeited and lost by the Plaintiffs and each of them.

7. For a further defense and counterclaim or cross-complaint, this Defendant alleges as follows:

A. That the Defendant, South Mercur Mining Company, is a corporation organized and existing under the laws of the State of Utah.

B. That the Plaintiff, New Mercur Mining Company, is a corporation organized and existing under the laws of the State of Utah.

C. That the Plaintiff, The Snyder Mines Incorporated, is a corporation organized and existing under the laws of the State of Utah.

D. That ever since the 1st day of September, 1939, the Defendant has been and is now the owner subject only to the paramount title of the United States, and is in possession of and entitled to possession of the Protection No. 4 and Nos. 7 to 15, both inclusive, lode mining claims situate in Camp Floyd Mining District, Tooele County, State of Utah.

E. That the Defendant discovered upon each of the said Protection Nos. 4 and 7 to 15 lode mining claims a vein or lode of rock in place bearing gold and other valuable minerals. That each of the said Protection Nos. 4 and 7 to 15 lode mining claims was located, and Defendant claims the right to hold, occupy and possess the same by virtue of full compliance with the local rules and customs of miners, the laws of the United States and of the State of Utah, by pre-emption, and by actual prior possession and location as lode mining claims upon the open and unappropriated public mineral domain of the United States.

[fol. 9] F. That the said Protection Nos. 4 and 7 to 15 lode mining claims include and embrace the property and area purportedly embraced within the said alleged Violet Ray Nos. 1 to 12 lode mining claims, described in paragraph number 2 of Plaintiff's Amended Complaint filed herein, under which Plaintiffs assert a claim adverse to the Defendant.

G. That the said alleged Violet Ray Nos. 1 to 12 lode mining claims, and each of them, have not now and never had any valid existence as mining claims, and that the claim of the Plaintiffs, and each of them, in and to the property purported to be covered thereby is without any right whatever and that the Plaintiffs, and each of them, have not any estate, right, title or interest whatever in the property or area included within the said Protection Nos. 4 and 7 to 15 claims or any part thereof.

8. For a further defense and further and second counterclaim and cross-complaint, this Defendant alleges as follows:

A. That the Defendant, South Mercur Mining Company, is a corporation organized and existing under the laws of the State of Utah.

B. That the Plaintiff, New Mercur Mining Company, is a corporation organized and existing under the laws of the State of Utah.

C. That the Plaintiff, The Snyder Mines Incorporated, is a corporation organized and existing under the laws of the State of Utah.

D. That ever since the 14th day of June, 1936, the Defendant has been and is now the owner, subject only to the paramount title of the United States, and is in possession of and entitled to possession of the Mercur Gold Nos. 4 and 7 to 12 lode mining claims situate in Camp Floyd Mining District, Tooele County, State of Utah.

E. That the Defendant discovered upon each of the said Mercur Gold Nos. 4 and 7 to 12 lode mining claims a vein or [fol. 10] lode of rock in place bearing gold and other valuable minerals. That each of the said Mercur Gold Nos. 4 and 7 to 12 lode mining claims was located, and Defendant claims the right to hold, occupy and possess the same by virtue of full compliance with the local rules and customs of miners, the laws of the United States and of the State of Utah, by pre-emption, and by actual prior possession and location as lode mining claims upon the open and unappropriated public mineral domain of the United States.

F. That the said Mercur Gold Nos. 4 and 7 to 12 lode mining claims include and embrace the property and area purportedly embraced within the said alleged Violet Ray Nos. 1 to 12 lode mining claims, described in paragraph numbered 2 of Plaintiff's Amended Complaint filed herein, under which Plaintiffs assert a claim adverse to the Defendant.

G. That the said alleged Violet Ray Nos. 1 to 12 lode mining claims, and each of them, have not now and never had any valid existence as mining claims, and that the claim of the Plaintiffs, and each of them, in and to the property

purported to be covered thereby is without any right whatever and that the Plaintiffs, and each of them, have not any estate, right, title or interest whatever in the property or area included within the said Mercur Gold Nos. 4 and 7 to 12 claims or any part thereof.

Wherefore, this Defendant prays judgment and decree of the Court:

(1) That the Plaintiffs, and each of them, be decreed to have no interest whatever in any part or portion of the property or area covered by the Protection Nos. 4 and 7 to 15 lode mining claims.

(2) That the Defendant be adjudged to be the owner, sub- [fol. 11] ject only to the paramount title of the United States and entitled to the exclusive possession and right of possession of the said Protection Nos. 4 and 7 to 15 lode mining claims and the area embraced therein and every part and parcel thereof.

(3) That the Plaintiffs, and each of them, be decreed to have no interest whatever in any part or portion of the property or area covered by the Mercur Gold Nos. 4 and 7 to 12 lode mining claims.

(4) That the Defendant be adjudged to be the owner, subject only to the paramount title of the United States, and entitled to the exclusive possession and right of possession of the said Mercur Gold Nos. 4 and 7 to 12 lode mining claims and the area embraced therein and every part and parcel thereof.

(5) That Defendant's title be confirmed and quieted in it.

(6) That Plaintiffs, and each of them, be restrained and enjoined pending this action and at the trial perpetually from entering upon or into any or all of the area covered by the said Protection Nos. 4 and 7 to 15 lode mining claims, and from mining any ores or materials therefrom or otherwise trespassing thereon, and from interfering with Defendant's possession thereof.

(7) That Plaintiffs, and each of them, be restrained and enjoined pending this action and at the trial perpetually from entering upon or into any or all of the area covered by the said Mercur Gold Nos. 4 and 7 to 12 lode mining claims, and from mining any ores or materials therefrom or other-

wise trespassing thereon, and from interfering with Defendant's possession thereof.

(8) For such other relief, general and special, as Defendant may be entitled to receive and for Defendant's costs herein incurred.

Senior & Senior, Attorneys for Defendant.

[fol. 12] *Duly sworn to by A. R. Shelton. Jurat omitted in printing.*

Received copy of the foregoing Answer to Amended Complaint and Counterclaim this 13 day of January, 1940.

Allen T. Sanford, H. Van Dam, Jr., J. H. Morgan, Attorneys for Plaintiff.

[fol. 13] IN THE DISTRICT COURT, IN AND FOR TOOELE COUNTY

[Title omitted]

REPLY

Come now the plaintiffs and for their reply to the answer and counterclaim of the defendant, allege as follows:

1. With reference to paragraph 6 A of the answer, plaintiffs deny each and every allegation thereof, and allege that the plaintiff, New Mercur Mining Company, has been the owner and in possession of Violet Ray Nos. 1 to 12 lode mining claims since March, 1931, until the 28th day of August, 1939, when it executed and delivered to The Snyder Mines Incorporated a lease on the said Violet Ray Nos. 1 to 12 mining claims, and other mining claims owned by it and contiguous thereto, and under said lease contract granted to said lessee a four-year lease thereon and the possession of all of its property, with the right to prospect for and develop and mine minerals therefrom and with the duty to perform, in accordance with the terms of said lease contract, the annual assessment work for said Violet Ray Nos. 1 to 12 mining claims and with the right to purchase all of said leased mining claims and, pursuant to the terms of said lease and option, The Snyder Mines Incorporated entered

into the possession of said Violet Ray Nos. 1 to 12 mining claims, and other leased mining claims, on the 28th day of August, 1939, and on the 28th day of August, 1939, it began [fol. 14] to perform the annual assessment work required to be done for the year ending 12:00 o'clock, noon, September 1, 1939, and since said 28th day of August, 1939, down to the 21st day of December, 1939, it has continued, without interruption, to perform labor and place improvements on and for the benefit of said Violet Ray Nos. 1 to 12 mining claims in order to perform the annual assessment work required to be performed for the year ending at 12:00 o'clock, noon, September 1, 1939, and, in the performance of said annual assessment work, it has caused labor and improvements to be placed on and for said Violet Ray Nos. 1 to 12 mining claims of a value in excess of Fifteen Hundred ($1500.00) Dollars.

2. With reference to the allegations of paragraph 6-B plaintiffs admit that there is upon each of said alleged claims a vein or lode of quartz or other rock in place bearing gold and other valuable minerals, and they deny each and every other allegation therein contained.

3. With reference to the allegations of paragraph 6-C, the plaintiffs allege they are not informed as to the area included in said alleged Protection Nos. 4 and 7 to 15 mining claims and, therefore, deny the allegations of said paragraph 6-C.

4. Plaintiffs deny each and every allegation of paragraph 6-D.

5. Respecting the further defense and counterclaim or cross complaint set forth in paragraph 7, and the subdivisions thereof, plaintiffs admit and deny as follows: They admit the allegations of subdivisions A and B, and as to subdivision C, plaintiffs allege The Snyder Mines Incorporated is incorporated under the laws of the State of Nevada, and deny each and every allegation of paragraph 7-D.

[fol. 15] 6. Respecting the allegations of paragraph 7-E, they admit that there is upon each of said alleged claims a vein or lode of rock in place bearing gold and other valuable minerals, and they deny each and every other allegation of said paragraph.

7. Respecting the allegations of paragraph 7-F, the plaintiffs are not informed as to the area embraced within said alleged Protection Nos. 4 and 7 to 15 lode mining claims and, upon that ground, deny the allegations of said paragraph.

8. With reference to the second counterclaim, as is set out in paragraph 8, and the subdivisions thereof, the plaintiffs admit and deny as follows: They admit the allegations of paragraphs 8-A and 8-B, and as to 8-C the plaintiffs allege The Snyder Mines Incorporated is incorporated under the laws of the State of Nevada.

9. Plaintiffs deny each and every allegation of paragraph 8-D.

10. With reference to the allegations of paragraph 8-E, the plaintiffs admit that there is upon each of said alleged claims a vein or lode of quartz or other rock in place bearing gold and other valuable minerals, and they deny each and every other allegation therein contained.

11. With reference to the allegations of paragraph 8-F, the plaintiffs are not informed as to the area embraced within the Mercur Gold Nos. 4 and 7 to 12 lode mining claims and, upon that ground, deny each and every allegation thereof.

[fol. 16] 12. Plaintiffs deny each and every allegation of paragraph 8-G.

Wherefore, plaintiffs having replied to defendant's answer and counterclaim, pray that defendant take nothing by its counterclaims, or either of them, and that it be adjudged that the plaintiffs are the owners of the property described in their complaint and that the prayer of their complaint be granted.

Allen T. Sanford, H. Van Dam, Jr., J. H. Morgan,
Attorneys for Plaintiffs.

Duly sworn to by J. H. Marshall. Jurat omitted in printing.

Received copy of the foregoing Reply this 27th day of January, 1940.

Senior and Senior, Attorneys for Defendant.

[fol. 17] In the District Court, in and for Tooele County

[Title omitted]

Reply to Reply of Plaintiff

Comes now the Defendant and for its reply to the reply of the Plaintiff denies each and every matter, allegation and thing affirmatively set out in the reply of the Plaintiff filed herein.

Wherefore, this Defendant prays as set out in its Answer and Counterclaim filed herein.

Senior & Senior, Attorneys for Defendant.

Duly sworn to by A. R. Shelton. Jurat omitted in printing.

Received copy of the foregoing reply this 5th day of March 1940.

H. Van Dam, Jr., Attorneys for plaintiff.

[fol. 18] In the District Court, in and for Tooele County

New Mercur Mining Company, a Corporation, and The Snyder Mines Incorporated, a Corporation, Plaintiffs,

vs.

South Mercur Mining Company, a Corporation, Defendant

Findings of Fact and Conclusions of Law—October 15, 1940

This case came on regularly for trial on March 5, 1940, before the Hon. P. C. Evans, one of the Judges in the Third Judicial District of Utah, sitting without a jury; Allen T. Sanford and Herbert Van Dam, Jr., appearing as attorneys for the plaintiffs, and Senior and Senior appearing as attorneys for the defendant, upon the amended complaint of the plaintiffs, the answer to amended complaint and counterclaim by defendant, the reply of the plaintiffs and the stipulation entered into by counsel in open court which limited the issues in the case to the question whether or not by virtue of non-performance of assessment labor the ground here in controversy was open to location at the time the defendant entered thereon to locate the Protection

claims; and the court having heard and considered the evidence offered by the respective parties, and having heard and considered the argument of counsel, and having heretofore made and announced its decision, finding the issues in favor of the plaintiffs and against the defendant, and being now fully advised in the premises,—

Now on motion of Herbert Van Dam, Jr., counsel for plaintiffs, now makes and files Findings of Fact herein as follows, to-wit:

1. That New Mercur Mining Company, one of the plaintiffs, was and is a corporation under the laws of the State of Utah; that The Snyder Mines Incorporated, one of the plaintiffs was and is a corporation under the laws of Nevada, qualified to do business in the State of Utah.

2. That the defendant South Mercur Mining Company was and is a corporation under the laws of Utah.

3. That the New Mercur Mining Company, one of the plaintiffs, subject to the paramount title of the United States Government and the lease and option granted to [fol. 19] The Snyder Mines Incorporated, the other plaintiff as herein set out, was from March, 1931, and now is the owner and in possession of the following described lode mining claims situate in the Camp Floyd Mining District, Tooele County, Utah, namely, Violet Ray Nos. 1 to 12, both inclusive.

4. That on the 28th day of August, 1939, the New Mercur Mining Company executed and delivered to The Snyder Mines Incorporated a lease on the said Violet Ray Nos. 1 to 12 lode mining claims, and other lode mining claims owned by it and contiguous thereto, and under said lease agreement granted to said lessee a four year lease thereon and the possession thereof with the right to prospect for and develop and mine minerals therefrom and with the duty to perform the annual assessment work in accordance with the terms of said contract for said Violet Ray Nos. 1 to 12, lode mining claims, and with the right to purchase all of said lode mining claims; and pursuant to the terms of said lease and option The Snyder Mines Incorporated entered into possession of all of said leased lode mining claims on the 28th day of August, 1939, and since said date has been and now is in possession thereof.

5. That on the 28th day of August, 1939, said The Snyder Mines Incorporated began to perform the annual assessment work required to be done upon the said Violet Ray Nos. 1 to 12 lode mining claims for the assessment period ending, as extended by Act of Congress, at twelve o'clock Meridian on the first day of September, 1939, and between said 28th day of August, 1939, and the 21st day of December, 1939, it continued without interruption to perform labor and place improvements on and for the benefit of said claims in order to perform the annual assessment work required for said period, and in the performance of said annual assessment work it caused labor and improvements to be placed on and for the benefit of said mining claims of a value in excess of $1500.00.

6. That the defendant after twelve o'clock Meridian on the said first day of September, 1939, entered upon the said Violet Ray Nos. 1 to 12 mining claims and attempted to locate upon and over said claims the Protection Nos. 4 and 7 to 15 inclusive, and that by reason of said alleged and pretended location of said Protection claims, the defendant claims an estate or interest in said property adverse to the plaintiffs.

7. That the claim of said defendant is without right and that the said defendant has not any estate, right, title or interest in the area included within said Violet Ray Nos. 1 to 12 claims or any part thereof.

8. That the defendant wrongfully entered upon said Violet Ray Mining claims or some of them and extracted and removed ore therefrom.

Based upon and pursuant to the foregoing Findings of Fact the court makes the following

Conclusions of Law

1. That the title of the plaintiffs in and to said Violet Ray [fol. 20] Nos. 1 to 12 lode mining claims in Camp Floyd Mining District, Tooele County, State of Utah, is a good and valid one subject to the paramount title of the United States Government.

2. That said defendant has no estate or interest whatever in or to the area embraced in said mining claims or any of them.

3. That at the time of the alleged and pretended locations of defendant's protection claims, to-wit, after twelve o'clock Meridian on the first day of September, 1939, said ground was not open to entry and said defendant did not initiate any right, title or interest in or to said premises.

4. That the plaintiffs are entitled to the decree of this court quieting title in them to said premises and perpetually restraining and enjoining the defendant from entering upon the said mining claims or any of them for any purpose; and that plaintiffs have and recover their costs.

By the Court:

P. C. Evans, Judge.

Dated this 15th day of October, 1940.

Copy of the foregoing proposed Findings of Fact and Conclusions of Law received October 10, 1940, at 2:00 o'clock P. M.

Senior & Senior, Attorneys for Defendant.

[fol. 21] IN THE DISTRICT COURT, IN AND FOR TOOELE COUNTY

NEW MERCUR MINING COMPANY, a corporation, and THE SNYDER MINES INCORPORATED, a corporation, Plaintiffs,

vs.

SOUTH MERCUR MINING COMPANY, a corporation, Defendant

DECREE—October 15, 1940

This case came on regularly for trial on March 5, 1940, before Hon. P. C. Evans, Judge presiding; Allen T. Sanford and Herbert Van Dam, Jr., appearing as attorneys for the plaintiffs, and Senior and Senior appearing as attorneys for the defendant, and the court having heard and considered the evidence herein and the arguments of counsel and having made its Findings of Fact and Conclusions of Law which are filed, and being now fully advised in the premises,—

Now on motion of Herbert Van Dam, Jr., counsel for plaintiffs, and based upon and pursuant to said Findings of Fact and Conclusions of Law,—

It is Ordered, Adjudged and Decreed that at the commencement of this action plaintiffs were and now are the owners of, subject to the paramount title of the United States, the Violet Ray Nos. 1 to 12 lode mining claims in Camp Floyd Mining District, Tooele County, State of Utah, and that their title thereto is good and valid; that the defendant has no right, title, claim or interest in or to said lode mining claims or any part thereof, and the title of the plaintiffs in and to said lode mining claims is hereby quieted against the defendant, and said defendant and all persons claiming or to claim under said defendant are hereby forever enjoined, debarred and restrained from entering into or upon said mining claims and from questioning the title of the plaintiffs thereto and from asserting any claims whatever in or to said mining claims or any part thereof adverse to the plaintiffs or either of them; and that plaintiffs have and recover their costs.

By the Court:

P. C. Evans, Judge.

Dated this 15th day of October, 1940.

Copy of the foregoing proposed Decree received October 10, 1940, at 2:00 o'clock P. M.

Senior & Senior, Attorneys for Defendant.

[fol. 22] In District Court of Tooele County

[Title omitted]

Notice of Intention to Move for New Trial—November 14, 1940

To the Hon. P. C. Evans, Judge of said District Court, and to Herbert Van Dam, Esquire, Attorney for the Plaintiffs:

Please Take Notice that the Defendant, South Mercur Mining Company, intends to and will move the Court to vacate and set aside the decision of the Court rendered in the above cause and to grant a new trial of the said cause upon the following grounds, to-wit:

1. Insufficiency of the evidence to justify the decision.

2. That the decision is contrary to and against law.

3. Errors in law occurring at the trial and excepted to by the Defendant.

Said motion will be made upon the minutes of the Court.
Dated November 14, 1940.

Senior & Senior, Attorneys for Defendant.

Received copy of the foregoing Notice this 14 day of November, 1940.

H. Van Dam, Jr., Attorney for Plaintiff.

[fol. 23] In the District Court, in and for Tooele County

[Title omitted]

Order Denying New Trial—March 12, 1941

The above entitled cause having been heretofore submitted to the Court, upon Defendant's motion for a new trial therein, and the Court having now fully considered the same,

It Is Ordered that the said motion be and the same is hereby denied.

Dated March 12, 1941.

P. C. Evans, Judge.

Filed March 12, 1941.

[fol. 24] In the District Court, in and for Tooele County

[Title omitted]

Notice of Appeal—June 5, 1941

To New Mercur Mining Company, and The Snyder Mines Incorporated, a corporation, Plaintiffs, to H. Van Dam and Chris Mathison, Attorneys for said Plaintiffs, and to David Bankhead, Clerk of aforesaid Court:

You and Each of You Will Please Take Notice, that the above named Defendant, South Mercur Mining Company, a corporation, hereby appeals to the Supreme Court of the State of Utah from the judgment made and entered in the above entitled cause by said District Court in and for Tooele

County, State of Utah, on the 15th day of October, 1940, and from the whole thereof, and also from the order denying Defendant's motion for a new trial made and entered by said Court in the above entitled matter on the 12th day of March, 1941. Said appeal is taken upon both questions of law and of fact.

Dated June 5, 1941.

Senior & Senior, Attorneys for Defendant.

Due service of the foregoing Notice of Appeal and receipt of a copy thereof this 5th day of June, 1941, is hereby acknowledged.

Chris Mathison & H. Van Dam, Attorneys for Plaintiffs.

[fol. 25a] IN THE SUPREME COURT OF THE STATE OF UTAH

No. 6392

NEW MERCUR MINING COMPANY and THE SNYDER MINES INCORPORATED, Respondents,

v.

SOUTH MERCUR MINING COMPANY, Appellant

OPINION

WOLFE, Justice:

Respondent New Mercur Mining Company, brought suit to quiet title on November 2, 1939 claiming ownership, possession, and right to possession subject to the paramount title of the United States, in and to the Violet Ray Nos. 1 to 12 lode mining locations situated in Camp Floyd Mining District, Tooele County, Utah, and alleging that appellant, South Mercur Mining Company, wrongfully claimed an adverse interest. The Snyder Mines Incorporated as lessee of the New Mercur Mining Company joined with the respondent in an amended complaint.

The appellant by its pleadings denied such ownership and alleged ownership in itself, claiming a forfeiture by respondents, and a relocation by appellant on September 1, 1939.

The ultimate issue raised by the pleadings and stipulation between the parties was whether or not the mining

claims in controversy were open to relocation by reason of the New Mercur Mining Company's alleged failure to perform the necessary annual assessment work provided for under U. S. Code, Title 30, Sec. 28 (R. S. 2324).

From a decision and decree by the lower court sitting without a jury in favor of the plaintiffs, defendant prosecutes this appeal.

The New Mercur Mining Company obtained the claims in question by conveyancee in 1935. On August 28, 1939, respondent, The Snyder Mines Incorporated, entered into a lease and option to purchase the Violet Ray Nos. 1 to 12 unpatented lode mining claims from the New Mercur Mining Company in which agreement the Snyder Mines Incorporated as lessee covenanted to perform the annual assessment work upon the claims above mentioned, either upon the claims themselves or in the "electric tunnel" which was then being driven on the property adjoining the claims.

The south headings of the "electric tunnel" were located on patented property adjoining the claims in question. This patented property was held by The Snyder Mines Incorporated as lessee under a lease and option from the Consolidated Mercur Gold Mining Company, the owner of the property, to the Lewiston Peak Mining Company, dated June 11, 1934, and assigned to The Snyder Mines Incorporated on July 2, 1936.

Congress on June 30, 1939, extended the period for annual assessment work for the year ending July 1, 1939, to September 1, 1939, "if such work or improvements are in good faith commenced on or before 12 o'clock meridian September 1, 1939, and prosecuted with reasonable diligence to completion." 53 Stat. 991, Chapter 257.

At noon on September 1, 1939, appellants located the Protection Nos. 4 and 7 to 15 lode mining claims including the area covered by the Violet Ray locations.

Appellant claims error on fourteen counts. Briefly, first, that the decision and decree rendered by the district court in favor of the respondents was against the law and not supported by the evidence; second, that the general finding was deficient in twenty-one particulars, the court having failed to make findings as to all material issues and questions of fact.

[fol. 25b] Considering the first alleged error, the appellant contends that the respondents suffered a forfeiture through its failure to do the necessary annual assessment

work "upon the claim" within the contemplation of U. S. Code Title 30, Sec. 28 (R. S. 2324), and as a result it is the owner by virtue of its relocation on September 1, 1939.

Respondent, New Mercur Mining Company, relies upon some of the work performed by its lessee, The Snyder Mines Incorporated, on and after August 28th, 1939, for the annual labor necessary to hold said claims under the provisions of the U. S. Code, Title 30, Sec. 28 (R. S. 2324).

It has long been settled that the annual assessment work may be performed off the claims, on one of a group of contiguous claims, as well as "on the claim" within the meaning of U. S. Code, Title 30, Section 28. Smelting Company v. Kemp, 104 U. S. 636, 26 L. Ed. 875.

In the instant case, appellant's title rests upon the relocation made after respondents' alleged forfeiture. The law does not favor forfeitures. Because of this reluctance on the part of the law, ordinarily the party claiming the forfeiture of a title must both plead it and establish it by clear and convincing proof. Lockhart v. Farrell, 31 Utah 155, 86 P. 1077; Strasburger v. Beecker, 20 Mont. 143, 49 P. 740; Copper Mountain Mining and Smelting Co. v. Butte and Corbin Consolidated Mining Co., 39 Mont. 487, 104 P. 540, 133 Am. St. Rep. 595. However, when it appears, as in the case at bar, that the work claimed was done off the claim, then the burden is upon the one claiming that such work fulfilled the requirements of the law and that the work was done for the development of all the claims and was so intended. Klopenstine v. Hays, 20 Utah 45, 57 P. 712; Hall v. Kearny, 18 Colo. 505, 33 P. 373; Brethour v. Clark et al., 31 Ariz. 24, 250 P. 254; Lindley on Mines, 3rd Edition, Vol. 2, Sec. 630, p. 1554, Sec. 631, p. 1565; Barringer & Adams, The Law of Mines & Mining, Vol. 2, p. 332.

On trial, the work testified to as having been performed by respondents consisted of four separate and distinct projects. First, the building of a road on to the Violet Ray claims which was begun on August 31, 1939. Second, the clearing and cleaning of several old tunnel workings on the Consolidated Mercur Gold Mining Company's "Hillside claim" by the Snyder Mines Incorporated. Third, an extension of the "electric tunnel" in a southwesterly direction towards the disputed claims. Fourth, an extension of the "electric tunnel" by leasers under lease No. 259 in a southeasterly direction towards the Violet Ray claims.

The record is by no means clear as to whether respondents or appellant ordered the road built upon the Violet Ray claims starting August 31, 1939. Appellant introduced evidence of receipts given to it by the superintendent of the construction company in payment for work done. On cross-examination, the superintendent testified, "I don't know whose road it was." Respondent's witness, Mr. Wondershek, superintendent of the Snyder Mines Incorporated, testified that he had ordered the work done. The respondents have failed to prove that they built the road. They cannot rely upon such work as satisfying the requirement as to annual assessment work; nor can the work done on the "Hillside claim" be regarded as preventing a forfeiture. This work was done after the expiration of the extended assessment period. The same is true as to the work performed in the southwest drift of the "electric tunnel." This work did not begin until *after* September 1, 1939. The preliminary work of cleaning the "electric tunnel" approach near the southwest drift and laying the track was performed on or about September 1, 1939, but respondents disclaim any benefits which might have arisen therefrom.

The question, then, of whether the New Mercur mining Company suffered a forfeiture by appellant's act of relocating at 12 o'clock noon September 1, 1939, turns upon the activities of respondent, Snyder Mines Incorporated, in the southeast heading of the "electric tunnel" on or before 12 o'clock noon of September 1, 1939. It is appellant's contention that respondents had not done the assessment work within the contemplation of U. S. Code, Title 30, Sec. 28. Further, that this work in the southeast heading performed by leasers from the Snyder Mines Incorporated was not shown to have been intended in good faith or at all as a resumption of assessment work for the Violet Ray claims; also, that there was no common ownership between the property of the Consolidated Mercur Gold Mines Company and respondent New Mercur Mining Company, so as to permit the application of any work performed to be applied [fol. 26a] as assessment work for the benefit of the Violet Ray locations.

"Long before patents were allowed, indeed from the earliest period in which mining for gold and silver was pursued as a business, miners were in the habit of consolidating adjoining claims, whether they consisted of one or

more original locations, into one, for convenience and economy in working them." Lindley on Mines, 3rd Edition, Vol. 2, Sec. 630; St. Louis Smelting Co. v. Kemp, supra.

In the case of Chambers v. Harrington, 111 U. S. 350, 4 S. Ct. 428, 28 L. Ed. 452, on appeal from a decision by this court, the court quotes from Jackson v. Roby, 109 U. S. 440, 3 S. Ct. 301, 27 L. Ed. 990, with approval, stating:

"It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditure the claim could not be successfully worked. In such cases it has always been the practice for the owners of different locations to combine and work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them. * * * In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case, the expenditures required may be made or the labor performed, upon any one of them." See also Love v. Mt. Oddie United States Mines Co., 43 Nev. 61, 184 P. 921.

According to the testimony of Mr. Neal Snyder, general manager of The Snyder Mines Incorporated, he was approached by the officers of the New Mercur Mining Company shortly after August 20, 1939, and offered a lease and option to purchase the property if the Snyder Mines Incorporated would do the necessary assessment work. The negotiations culminated in the lease and option of August 28, 1939. Mr. Snyder testified that the work had actually started prior to the signing of the contract and that it was still in progress. That plans had been formulated to develop the area through the "electric tunnel."

The work mentioned by Mr. Snyder and relied upon by respondent in its brief was being performed by leasers under a lease No. 259 from the Snyder Mines, which had been in operation since March of 1939. On or before September 1, 1939, the respondents' leasers withdrew from the heading which they had been driving and started the southeast drift which we are now considering. This drift had been pushed 170 feet southeasterly at the time of trial. The evidence does not disclose whether the leasers on their own initiative made such change or the Snyder Mines Incorpo-

rated had ordered it. It does appear by explanation that the "leasers" had exhausted the ore in the heading and had dropped back fifty feet to where ore was exposed in the tunnel and had followed the ore southeast.

Mr. Earl B. Young, a mining engineer and geologist for the Snyder Mines Incorporated, testified that he had participated in discussions in regard to the development of the Violet Ray claims. That in his opinion the extension of the "electric tunnel" step by step in ore was the most economical and practical method of mining and developing the claims which lie ahead. That they had a long range program. That the "electric tunnel" when driven into the Violet Ray claims would present a main haulage level which was highly desirable for economic mining.

Mr. Marshall, President of the New Mercur Mining Co., a practical miner of some thirty years experience, testified that in his opinion the continued extension of the tunnel on to the Violet Ray claims was the most feasible method of mining and developing these claims.

Appellant introduced no evidence discrediting the above testimony; hence, it remains undisputed. There does not appear in the record any evidence that the work was a subterfuge, or done in bad faith. On the contrary, there appears nothing but uncontradicted testimony both that the work was practical, tending to develop the claims, and that it was done in good faith, as is evidenced by the continued prosecution of the tunnel, the posting of notice of such work upon each of the claims and at the portal of the tunnel as required by Sec. 55-1-5, R. S. U. 1933, prior to the date [fol. 26b] of expiration, September 1, 1939. One general system was conceived and well adapted in light of the physical surroundings and the geological information then available. Harrington v. Chambers, 3 Utah 94, 1 P. 362; Klopenstine v. Hays, supra; Wilson v. Triumph Consol. Mining Co., 19 Utah 66, 56 P. 300. "It is not necessary for claimant to prepare plans and specifications with regard to how he intends to develop his claims." Nevada Exploration and Mining Co. v. Spriggs, 41 Utah 171, 124 P. 770.

Point is made that the Snyder Mines Incorporated had been actively mining and developing the Consolidated Mercur Gold Mining Company's property under a previous plan. There is, however, no principle of mining law prohibiting a mining company from enlarging its plan of exploration as was done in the instant case.

The fact that the work under lease No. 259 has been in progress previously does not prevent the work from being applied as assessment work on the Violet Ray claims so long as it is so intended, is practical, and will promote the exploration of the claims on which the assessment work is claimed. The evidence here establishes the good faith of the respondents. Fissure Mining Co. v. Old Susan Mining Co., 22 Utah 438, 63 P. 587.

The Copper Mountain Mining and Smelting Co. v. Butte and Corbin Consol. Copper and Silver Mining Co., supra, is cited by appellant and relied upon as supporting its view that "the mere purpose of mining ore in a given area such as activated the granting of and working under lease No. 259 would not render work applicable as assessment work on other claims." In that case the tunnel was running in the *opposite direction* from the claim and the court expressed its opinion that from the physical evidence the "tunnel was primarly to encounter pay ore in the 'M. L.' claims and could not reasonably have been intended as a part of any general plan." That obviously is not the situation here. The fact that here the leasers were operating under a lease of March, 1939, with the expressed intent to find and mine ore within certain designated areas does not necessarily imply that the work could not be also directed toward the general plan of developing all the claims as a unit when there was a definite intention to make it so. The fact that an attempt is made to discover ore in the course of driving the tunnel or drift does not preclude such work from being assessment work. Taylor v. Parentau, 23 Colo. 368, 48 P. 505. It is the general plan and the intent behind it which controls. There was developed subsequently to the granting of this lease a plan or scheme for the development of these additional claims. The prior lease cannot be said to be conclusive evidence of bad faith. At the time it was entered into the future could not be fully foreseen. The Snyder Mines Incorporated had no lease and option at this time from the New Mercur Mining Company.

We now turn to the really difficult part of this case—the community of interest phase.

"There must be a community of interest in each claim. This interest need not be of a strictly legal nature, and different owners of adjoining claims can undoubtedly join in an agreement whereby a single shaft may be sunk or a

tunnel driven on one of the claims for the joint benefit of the respective claims, even though not owned in common, and this will count as assessment work on all claims actually benefited, as being a part of a general plan or scheme of development." Lindley on Mines, 3rd Edition, Vol. 2, Sec. 630, p. 1552.

A consideration of the matter of a community of interest merits a few preliminary observations.

Mining law as developed before and contemporaneous with the enactment of Congressional Acts represents an evolution contributed to by miners' customs and congressional acts which themselves were in some cases a crystal-ization of those customs. The requirement that, in order to hold possessory title, work must be done on the claim (afterward expanded to permit work to be done for the benefit of the claim whether off or on the claim) had a twofold purpose: To develop the mineral resources of the nation and to discourage the holding of claims out of competition [fol. 27a] for any possible unearned increment. From the time of the "tunnel amendment" (Act passed Feb. 11, 1875, Sec. 2324, R. S.) the courts have become more liberal in holding that "work done outside of a claim of groups of claims, if done for the purpose and as a me*ans* of prospecting or developing the claim, * * * is as available for holding the claim as if done within the boundaries." While it is stated (in Sec. 631—Lindley on Mines, Vol. 2, 2nd Ed., page 1557) that the "tunnel amendment" "did not affect the character of other work to be done or improvements to be made according to the law as it stood before" certainly the departures from the strict rule which required that the work had to be done on the claim or on one of a group of claims, gained impetu*ous*. In Hain v. Mattes (Colo.) 83 P. 127, it was even argued that the Amendment of 1875 was intended to permit the assessment work to be done through a tunnel on land not owned by the claimant. That such may be done is at present the law. That is not to say that the owner of a group of claims can perform his work outside the boundaries of his claim on the property of another as a trespasser or perhaps even as a mere licensee. Lindley on Mines, Sec. 630, p. 1558, 2nd Edition, Vol. II, although doubt has been thrown on whether the claimant must show ownership or control over the land in which the tunnel is driven. God-

frey v. Faust, (S. D.) 101 N. W. 718, on rehearing, 105 N. W. 462.

The term community of interest so often used in the textbooks, Land Board decisions and cases seems not to have had the favor of accurate definition, perhaps for the very reason that an abstract definition comprehending all concrete cases would be most difficult. Community of interest can only pertain where there are separate claims or separate owners. Where the claims are owned in common, or all by one person, and the assessment work done in one of them, the community of interest in the claims is a legal one and the community of interest in the assessment work is a natural consequence of this legal community of interest. Where there are separate owners the community of interest may in some measure be the amenability of the claims to a common development. However, if the assessment is done off the land of any claimant it is not certain that such community of interest would be sufficient. In such case it would seem that there must be some common right in the assessment work. The owner or owners of the claims whose continued possessory right is made to depend on the development work must have a legal relationship to the work if it is to inure to the benefit of the claim or claims for which it is contended it was done. Where there is a legal relationship between the owner of the land on which the development work is done and the owner of the land claims it may be sufficient to create the community of interest in the workings depending on the nature of that relationship. See in reference to community of interest: Wilson v. Triumph Mining Co., supra; McDonald v. McDonald, 16 Ariz. 103, 144 P. 950; Johnson v. Young, 18 Colo. 625, 34 P. 173; Richard v. Thompson, (CCA), 72 F. (2d) 807.

In this case The Snyder Mines Incorporated held the relationship with the New Mercur Mining Co. of lessee of the Violet Ray group of claims with an option to purchase. The property on which was done the development work which is relied on as preventing forfeiture in this case belonged to the Consolidated Gold Mercur Mining & Milling Co. but The Snyder Mines, Inc. had a lease and an option to buy good up to March 1, 1954 during which time the claims were demised to it, the royalties under the lease to be credited on the purchase price of $375,000. While the matter is not free from doubt we think the lessor

relationship between the Consolidated Gold Mercur Mining & Milling Co. and The Snyder Mines Inc. with option to purchase was sufficient to give the New Mercur Mining Co. a community interest in the work in the tunnel for purpose of making such work inure to support the possessory title of it and reasonably tended to develop the Violet Ray claims, a fact in regard to which we have already held there was sufficient evidence to so find. The fact that the Snyder Mines might discontinue with the lease or default in the option cannot affect the current efficacy of that work to prevent forfeiture of the possessory rights to the Violet Ray claims.

In the instant case, the respondent, Snyder Mines Incorporated, is not a trespasser on the Consolidated Mercur Gold Mining Company's property. The fact that the agreement between them conveys no title to the property until payment of the purchase price, even should it be construed as impliedly covenanting that the property should not be used for any purpose other than that which it was demised, does not prevent the performance of assessment work to be applied on adjoining claims by the lessee as against a stranger. The respondent is on the property as a lessee with an option to buy and have the rental paid credited on the purchase price. The appellant is in no position here to urge the agreement between the grantor and grantee mining company did not contemplate assessment work for adjoining claims. The fact that work [fol. 27b] which has a direct tendency to develop the claims owned by other parties was not contemplated as assessment work for such claims by the grantor and grantee in their agreement, cannot be relied upon by a stranger to the agreement to work a forfeiture. Brewster v. Shoemaker, 28 Colo. 176, 63 P. 309; 53 L. R. A. 793, 84 Am. St. Rep. 188; Godfrey v. Faust, 18 S. D. 567, 101 N. W. 718, 20 S. D. 203, 105 N. W. 460.

The case of Percy La Salle Mining & Power Co. v. Newman Mining, Milling & Leasing Co., (D. C.), 300 F. 141, cited and relied upon by appellant is not in point here. That case arose out of a dispute between the grantor and grantee mining companies. A stranger was not involved.

The case of Hawgood v. Emery, 22 S. D. 573, 119 N. W. 177, urged by appellant as being of "particular interest and applicability in the case at bar" is readily differentiated. In that case there was an attempt of one partner

to enter into a scheme whereby, without any agreement therefor with his partner, he would perform work upon property of which he was the sole owner, and upon property of which he was part owner with third parties, and hold the defendant liable therefor. The court held that in the absence of a general plan or scheme for development for the doing of such work, he cannot hold his co-partner liable. This clearly differs from the case at bar. Here we have an agreed plan or scheme. The fact that the legal owner of the property had not entered into the agreement does not make it analogous.

The case of Mt. Diablo M. & M. Co. v. Collison, 5 Sawy. 439, aptly expresses our opinion. "A general system of work for the exploration of the whole ground embraced in these three sets of contiguous claims seems to have been carried on by the plaintiff, and we think all work done was a part of that general system, and as such applicable to all the claims which had by purchase been concentrated in a single party, the plaintiff."

In the case of Hain v. Mattes, 34 Colo. 345, 83 P. 127 at 130, appears the following language:

"If labor performed upon a wagon road outside the boundaries of the claim, or 'outside of any claim' (Mt. Diablo Case, supra), or 'at a distance from the claim itself' (St. Louis Co. v. Kemp, supra), or 'upon a patented claim' (Hall-Kearney Case, supra), may be held to be a compliance with the law relating to annual assessment work, work done in a tunnel for the purpose of developing the claim, and which has a tendency to develop it, may be so considered regardless of the contiguity or noncontiguity of territory, from the portal of the tunnel to the claim sought to be developed. The true test to be applied is, does the work benefit or tend to benefit the claim, and was it done for the purpose of developing the claim? The fact that the territory between the tunnel and the claim to be developed is vacant and unoccupied, *or owned by another person,* becomes important only in so far as that fact, if it exists, may have a bearing upon the ultimate question of fact, *as to whether the tunnel does or does not tend to develop the claim,* which question of fact, must be determined by the jury under proper instructions. Our conclusion is that there was no error in the instruction." (Italics added.)

The Hain case, supra, is to be restricted here to the facts of the case at bar. We do not go to the extreme here of finding that the territory separating the claims may be owned by a stranger and still allow the assessment work to apply. We do find that the work performed in the instant case by The Snyder Mines Incorporated, which owns an equitable interest in the adjoining ground by reason of its performance on the contract of purchase with the Consolidated Mercur Gold Mining Company, may be applied as assessment work on adjoining properties of the New Mercur Mining Company.

"In cases like the one at bar, this court has held that the general findings of the trial courts, when 'not clearly against the preponderance of the evidence', will not be disturbed." Nevada Exploration and Mining Co. v. Spriggs, Utah, supra.

[fol. 28] We now consider the contention of appellant that the trial court failed to find on all the material issues and questions of fact. It was stipulated in open court at the outset of the trial that the sole question was as to whether the Protection No. 4 and 7 to 15 lode mining claims which included the area covered by the Violet Ray locations were open to location at 12 o'clock noon September 1, 1939. This question depended on whether the New Mercur Mining Company had forfeited its possessory title by failing to do the required assessment work before that time. Findings 3 and 4 are as follows:

"3. That the New Mercur Mining Company, one of the plaintiffs, subject to the paramount title of the United States Government and the lease and option granted to The Snyder Mines Incorporated, the other plaintiff as herein set out, was from March, 1931, and now is the owner and in possession of the following described lode mining claims situate in the Camp Floyd Mining District, Tooele County, Utah, namely, Violet Ray Nos. 1 to 12, both inclusive.

"4. That on the 28th day of August, 1939, the New Mercur Mining Company executed and delivered to the Snyder Mines Incorporated a lease on the said Violet Ray Nos. 1 to 12 lode mining claims, and other lode mining claims owned by it and contiguous thereto, and under said lease

agreement granted to said lessee a four year lease thereon and the possession thereof with the right to prospect for and develop and mine minerals therefrom and with the duty to perform the annual assessment work in accordance with the terms of said contract for said Violet Ray Nos. 1 to 12, lode mining claims, and with the right to purchase all of said lode mining claims; and pursuant to the terms of said lease and option The Snyder Mines Incorporated entered into possession of all of said leased lode mining claims on the 28th day of August, 1939, and since said date has been and now is in possession thereof."

These findings, in view of the evidence and the stipulation, formed the basis for the conclusion that there had not been a forfeiture and therefore a basis for the more ultimate conclusion that plaintiffs had the possessory title and defendants had no estate or interest in said Violet Ray claims.

Any more detailed findings on subsidiary or other facts would necessarily have been adverse to the appellant, as appears from the evidence and the law hereinabove discussed. Maynard v. Loco. Eng. Ins. Ass'n., 16 Utah 145, 51 P. 259. Western Securities Co. v. Spiro, 62 Utah 623, 221 P. 856.

The work being in progress at noon on September 1, 1939, by the Snyder Mines Incorporated on behalf of the New Mercur Mining Company, and having since been prosecuted with diligence, it brings the respondents within the provision of Chapter 257, 53 Stat. 991, and U. S. Code, Title 30, Sec. 28 (R. S. 2324); thus preventing a forfeiture and making appellant's alleged relocation invalid. Lockhart v. Farrell, Utah, supra.

The judgment is affirmed with costs.

We Concur:

David W. Moffat, Chief Justice; Martin M. Larson, Justice; Roger I. McDonough, Justice.

Pratt, Justice, on leave of absence.

[fol. 29] IN THE SUPREME COURT OF THE STATE OF UTAH

No. 6392

NEW MERCUR MINING COMPANY, and THE SNYDER MINES INCORPORATED, Respondents,

v.

SOUTH MERCUR MINING COMPANY, Appellant

JUDGMENT—July 11, 1942

This cause having been heretofore argued and submitted and the court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, affirmed with costs.

[fol. 30] IN THE SUPREME COURT OF THE STATE OF UTAH

[Title omitted]

ORDER DENYING REHEARING—December 3, 1942

Upon consideration of the Petition for Rehearing heretofore filed herein and of the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is, denied.

[fol. 31] PORTIONS OF BILL OF EXCEPTIONS

(Page references are to Record on Appeal before Supreme Court of Utah) (p. 98):

In the Third Judicial District Court, in and for Tooele County, State of Utah

No. 2649

NEW MERCUR MINING COMPANY, a Corporation, and THE SNYDER MINES INCORPORATED, a Corporation, Plaintiffs,

vs.

SOUTH MERCUR MINING COMPANY, a Corporation, Defendant

BILL OF EXCEPTIONS

Be It Remembered, That this above entitled cause came on for hearing at the County Court House in the City of Tooele and County of Tooele, State of Utah, on the 5th day

of March, 1940 before the Hon. P. C. Evans, one of the Judges of said Court, sitting as a Court without a jury, Allen T. Sanford, Esq. and Herbert Van Dam, Esq. appearing for the Plaintiffs, and Clair M. Senior, Esq. and Raymond T. Senior, Esq. appearing for the Defendant.

Thereupon, the case having been called for hearing the following proceedings were had:

(p. 100, l. 7-23):

Mr. Senior: I thought by means of stipulation we might reduce the issue, I expect if we so stipulate you would likewise be willing to stipulate to the reduction of the issues affecting the validity of our claims. I don't want you to stipulate as to the validity of our locations in that sense but if you want us to stipulate as to the posting of your notices and the discoveries on your claims as at the time when you made them and will likewise stipulate in that respect to the posting of our notices and monumenting on those claims we think we can eliminate those issues.

We don't understand you have a question our notices are posted, I think your pleading admits that and also we monumented our claims.

[fol. 32] Mr. Sanford: We will so stipulate. We will stipulate this that in your attempted location on or immediately following September first as you allege you made discoveries and posted the notice and staked the ground.

(p. 101, l. 8—p. 102, l. 25):

Mr. Sanford: We will stipulate as I say, that they made discoveries and located the ground, posted the location notices and staked it on the dates their location notices may show.

Mr. Senior: And in regard to the locations made by the plaintiff in the action we are willing to stipulate that they based it upon discoveries made in the location of these claims I think in 1932.

Mr. Sanford: 1931.

Mr. Senior: 1931, at the time shown on the notices which will be produced in the abstract and they posted notices of location and monumented the claims.

Mr. Sanford: And made discoveries.

Mr. Senior: The Court please it seems to reduce it down—the question evolves to one of whether or not by virtue of non-performance of assessment labor this ground

was open to location at the time the Protection claims were located.

The Court: I see.

Mr. Sanford: That is all right.

Mr. Van Dam: Just a question there for the record. Mr. Sanford, that eliminates consideration of the claimed locations of Mercur Gold location claims in 1936?

Mr. Sanford: That is what I was going to ask.

Mr. Van Dam: Did you get my question, Mr. Senior?

Mr. Senior: I reduced, I intended to eliminate reliance on our part of 1936 locations except as they may serve as a background of this thing. We rely on Protection locations located after twelve o'clock noon, September 1st, 1939.

Mr. Van Dam: I wonder if the further stipulation might be useful as to the ownership of the respective groups there Mr. Senior, I mean do you want us to go through the motions of proving our title in that group of claims north of the Hillside group and do you want us to go through the mo-[fol. 33] tions of proving the title of the New Mercur in that Hillside group?

Mr. Senior: My thought in this is that the elements of proof in that respect should consist solely in the abstracts of title, we should have the abstracts of title showing ownership.

Mr. Van Dam: All right we have them.

Mr. Sanford: Mark these as exhibits.

We offer Exhibit "1" which is the Abstract of Title to the Violet Ray No. 1 to Violet Ray No. 12 claims, and certified to the 13th day of February, 1940, showing title in the New Mercur Mining Company, it includes the locations notices and amended location notices.

(p. 103, l. 16-20):

Mr. Sanford: We offer plaintiffs' Exhibit "2" which is an abstract of title to what we call the Hillside group which includes all of these claims in the Hillside, Cyclone, Carthage, Carthagenia, Falcon, Bunker Hill, etc., and Hillside No. 3, and also Hillside No. 2.

(p. 104, l. 1—p. 106, l. 26):

Mr. Sanford: Next we offer Exhibit No. "3" which is Trustee's deed, J. H. Marshall, as trustee in bankruptcy conveying the Hillside group of claims, I will call them the

Hillside, you understand it means all of the claims mentioned there and all other property including the Violet Ray claims to Allen T. Sanford, and recorded April 9th, 1936.

Mr. Senior: Same objection as to materiality.

The Court: The objection is overruled.

Mr. Sanford: And Exhibit No. "4" shows it is a deed executed by Allen T. Sanford and wife and Joe Meli and wife transferring the Hillside group and other claims to the New Mercur Mining Company.

Mr. Senior: The same objection.

The Court: The same ruling.

Mr. Sanford: Exhibit No. "5" is a decree quieting title, a certified copy, in the case of New Mercur Mining Company, a corporation, against the Hillside Gold Mining Company, et al., quieting title to the Hillside group in the New Mercur Mining Company.

Mr. Senior: The same objection.

[fol. 34] The Court: The same ruling. In making these rulings I will expect you to argue the materiality when you argue the case.

Mr. Senior: We appreciate this, it may be connected in such a way to acquire materiality but we are saving our objection at this time.

Mr. Sanford: Exhibit No. "6", Lease and Option Agreement between the New Mercur Mining Company and the Snyder Mines Incorporated, bearing date August 28, 1939, by this agreement, the New Mercur Mining Company gives a lease to The Snyder Mines Incorporated in all of its properties in the Violet Ray and Hillside group and other parties and with the agreement The Snyder Mines Incorporated do assessment work and the other provisions, and provides for payment of royalty out of those groups.

Mr. Senior: There is no objection as to these claims involved, we object to it, it is immaterial.

The Court: The objection is overruled.

Mr. Sanford: They are all the same contracts, of course.

The Court: Let the Exhibit be received.

Mr. Sanford: The next Exhibits "7" and "8" they go together, being the abstract of title, I will let Mr. Van Dam explain those exhibits, he is more familiar with them.

Mr. Van Dam: These abstracts, or a group of abstracts covering a large number of claims; the pertinent ones are Defiance Survey No. 3087 and the entries in the abstract referring to that claim, I am speaking of Exhibit No. "8",

the entries in the abstract referring to that claim are numbers 35, 39, 52, 53, 64, 73, 78, 89, and 90. I assume from those inferences if necessary these particular entries in the abstract may be copied into a record.

And Exhibit No. "7" the claims referred to which are pertinent here are the Ralph Lot No. 69, the Ruby Lot No. 67, the Lulu Lot No. 71, and Fremont Lot No. 70.

The entries numbered in the abstract in regard to the Ralph claims are 2, 25, 34, 37, 41, 50, 56, 64, 72 and 89.

As to the Ruby they are numbers 8, 19, 34, 37, 41, 50, 56, 64, 77 and 89.

The Lulu numbers 7, 20, 34, 41, 50, 56, 64, 78 and 89.

The Fremont numbers 6, 21, 34, 36, 41, 50, 56, 64, 79, and 89.

Those entries follow through from patents, various main [fol. 35] conveyances until in June 1934, as I think these entries will show title was in the Consolidated Mercur Gold Mines Company and also shows at that time a lease and option contract between the Consolidated Mercur Gold Mines Company and the Lewiston Peak Mining Company and a subsequent assignment of that lease and option contract between the Lewiston Peak Mining Company to The Snyder Mines Incorporated.

Mr. Senior: May I ask what number the lease and option is?

Mr. Van Dam: 89 is the assignment from Lewiston Peak Mining Company to The Snyder Mines Incorporated; 64 is the lease and option to purchase. We would be glad to furnish you the complete copy of that if the abstract isn't complete.

Mr. Senior: We feel if it is going to be in the record at all a complete copy should be there, not the interpretation of the contract in the form of an abstract.

Mr. Van Dam: I don't know whether I have one with me Mr. Senior, I will supply a complete copy of that for the record.

(p. 146, l. 13-17):

Mr. Sanford: The Court please counsel has stipulated we may substitute a copy of Exhibit No. "6" which is a contract between the New Mercur Mining Company and The Snyder Mines Incorporated, so I have had marked a copy of it and I am withdrawing the original.

(p. 147, l. 25—p. 148, l. 14):

(Portions of direct examination of Earl B. Young, mining engineer employed by The Snyder Mines Incorporated and witness called on behalf of Plaintiffs):

Q. Calling your attention now to the map on the wall marked Exhibit "9", state whether or not that map was prepared under your supervision and direction?

A. Yes, it was.

Q. It is drawn to scale?

A. It is drawn to a scale of one inch equals two hundred feet.

Q. Now in a general way that map represents three groups of mining claims, that is to the north or top of the map, the map shows the Lulu, Ruby, Ralph, Fremont claims in the group of The Snyder Mines Incorporated?

A. Yes sir.

Q. To the south of that the so called Hillside group of patented claims of the New Mercur Mining Company?

[fol. 36] A. Yes sir.

Q. And further south the group of twelve claims marked on the map as Violet Ray Nos. 1 to 12 inclusive, now those are the correct designations of those claims are they?

A. Yes sir.

(p. 148, l. 28—p. 149, l. 10):

Q. Now, Mr. Young, calling your attention to the green marks at the top of the map and extending south and easterly and in criss cross directions in there, what do they represent?

A. The green lines represent the workings on what is known as the electric tunnel level; one of the workings in the property that is being conducted by The Snyder Mines Incorporated and Mercur.

Q. Now where is the portal of that electric tunnel?

A. The portal is not shown on the map but it would be almost directly above the point on the map shown there, a matter of fifteen hundred feet to the same scale as this map.

(p. 150, l. 2-4):

Q. Now will you look at the marking on the map, the point where that face or heading in the electric tunnel was as of August 28th, 1939?

(p. 150, l. 17-19):

Q. Now this southeast—is that the way to talk about that, this southeast extension designated where that was on August 28th, 1939, or September first.

(p. 150, l. 28—p. 151, l. 7):

A. On September first we started at that point right there shall I mark it "x" or something?

Q. Yes.

A. Mark it "x" on the Fremont claim by Lot 70, the face, I might say we had gone ahead to this point during previous months there was no ore at that point we came back to a crossing at that point and found ore and started out at that point and continued out southeasterly since that time.

(p. 151, l. 27-28):

A. The southeast workings is a matter of approximately one hundred feet from the side line of the Fremont claim.

(p. 159, l. 4-15):

Q. I am not sure whether it was in an answer that was given by you on a question asked by Mr. Van Dam reference was made to the claims at the northern most point on the map including the Fremont, Lulu, Ralph, and Ruby as the Snyder group, you didn't mean to be understood as indicating that the Snyder company owns these claims, do you?

A. No sir, just operating under lease and bond agreement.

Mr. Van Dam: That may be so understood Mr. Senior when I refer to that it is under claim, under lease and option.

[fol. 37] Mr. Senior: I just wanted to clear it up.

Mr. Van Dam: The record may so show.

(p. 255, l. 7-12):

(Portion of direct examination of William Young, engineer employed by The Snyder Mines Incorporated and witness called on behalf of Plaintiffs):

Q. I hand you a small map, marked Exhibit 14, purporting to be a map showing the holdings of the Snyder Mines, Inc., the Hillside group and the, or the Violet Ray claims,

a smaller map than the others, than the exhibit on the board, and ask you if you have shown on that map the four claims that you say have been recently located?

(p. 262, l. 9-14):

Mr. Senior: Now, Mr. Van Dam, I think that you will stipulate with me that the area marked on this Exhibit 14 as "The Snyder Mines, Incorporated" is the property of the Consolidated as shown by the abstract of title.

Mr. Van Dam: And operated and in possession of The Snyder Mines, Incorporated, under the lease and option.

(p. 291, l. 5-10):

Mr. Senior: The defendant, at this time, offers an abstract of title covering the Protection Nos. 1 to 12 lode mining claims, inclusive, which abstract has been marked for identification as Exhibit "E", and covers the ground which, for practical accuracy, is shown on Exhibit 9, introduced by the plaintiffs.

(p. 291, l. 16-23):

Mr. Senior: A correction on that. This abstract covers, the Protection Nos. 1 to 15 are in this abstract, and I am introducing the abstract as to the Protection Nos. 1 to 15, some of the conflict being shown on this map, and we shall introduce another map which will show in a general way the conflict with the other claims, which has not been shown on here, Exhibit 9 not showing all of the Protection claims which are in conflict with the Violet Ray claims.

(p. 292, l. 15—p. 293, l. 3):

Mr. Van Dam: Mr. Senior, did you say there were fifteen of those Protection claims?

[fol. 38] Mr. Senior: There are fifteen of those.

Mr. Van Dam: Limited to the entries affecting the Protection locations, there is no objection.

The Court: It may be received.

Mr. Senior: It was our understanding that on the stipulation entered into at the commencement of this proceeding, that proof would not be required to the effect that the Protection claims were located, based on discovery, after 12:00 o'clock noon, on September 1, 1939, and that the notices of location were duly posted, and the claims were duly monu-

mented, and then the recording of the notices took place, as indicated by the abstract of title.

Mr. Van Dam: Reserving, however, the question whether that ground was open to entry.

(p. 308, l. 12-19):

Mr. Van Dam: There is lease and option from The Consolidated Mercur Gold Mines Company by its trustees to Lewiston Peak Mining Company.

Mr. Senior: It is our understanding that that lease is a part of one of the exhibits of the plaintiff in the case, and at the time the plaintiff offered the abstract it was received with the understanding that a complete copy of that lease was to be furnished.

(p. 309, l. 19-26):

The Court: Very well, let them be received as exhibits, and become a part of the record in the case. That, I think, was contemplated by the record as made up.

Mr. Van Dam: That is the original, and that is a copy. I would like to withdraw the original.

The Court: You may substitute the copy for the original, and withdraw the original when it has been examined, to see that it is an exact copy.

(p. 310, l. 4-8):

Mr. Van Dam: I think perhaps the lease between The Consolidated Mercur Gold Mines Company and Lewiston Peak Mining Company was not designated by any letter or exhibit number. As far as I am concerned, the clerk may [fol. 39] complete that record at his convenience.

(p. 311, l. 7-10):

Mr. Sanford: I think it should be 8-A, then.

Mr. Senior: Make it 8-A, then. That is when the question was raised.

The Court: Very well.

[fol. 40] PLAINTIFF'S EXHIBIT 6

Lease and Option Agreement

This Agreement made and entered into in duplicate this 28 day of August, 1939, by and between New Mercur Mining

Company, a corporation under the laws of Utah, first party, and The Snyder Mines Incorporated, a corporation under the laws of Nevada, qualified to do business in Utah, second party,

Witnesseth:

For and in consideration of the sum of Ten ($10.00) Dollars paid by second party to first party, receipt whereof is hereby acknowledged, and of the terms and conditions herein stated to be kept and performed by the parties respectively, it is agreed:

1. First party does hereby give and grant to second party the right and option to purchase the following described property situate in the Camp Floyd Mining District, Tooele County, State of Utah, to-wit:

Patented Mining Claims

Hillside, Hillside No. 2, Hillside No. 3, Cyclone, Gunsite, Carthage, Bunker Hill, Carthegenia and Falcon, all of which are designated as Survey No. 2989; the Hillside No. 3 claim being subject to a contract between Sacramento Gold Mining Company and the Hillside Gold Mining Company, recorded in Book "C" of Bonds & Agreements, at pages 321-2-3, Tooele County Records; Christmas Gift, designated as Survey No. 3679; Gold Chain, designated as Survey No. 3679; Colorado, designated as Survey No. 3128; Gold Channel, designated as Survey No. 3179; Gold Channel No. 1, designated as Survey No. 3179; Gold Channel No. 2, designated as Survey No. 3179; Tip Top, designated as Survey No. 3179; Thursday, designated as Survey No. 3179; Reliance, designated as Survey No. 3179; Relief, designated as Survey No. 3179; Trademark, designated as Survey No. 4568.

Unpatented Mining Claims

Violet Ray No. 1	Violet Ray No. 7
Violet Ray No. 2	Violet Ray No. 8
Violet Ray No. 3	Violet Ray No. 9
Violet Ray No. 4	Violet Ray No. 10
Violet Ray No. 5	Violet Ray No. 11
Violet Ray No. 6	Violet Ray No. 12

[fol. 41] Miscellaneous:

Together with appurtenances and any machinery or equipment now on said premises, and the right to use for milling and mining purposes any water now on said premises or that may be developed thereon;

Subject to the rights of Sacramento Gold Mining Company and together with all rights of New Mercur Mining Company (first party herein) under agreement entered into by and between said parties under date of August 28, 1939; and subject to a tunnel easement through a portion of the Gold Chain claim granted to the Utah Mercur Gold Mining Company upon the following terms and conditions:

(a) The total purchase price is One Hundred Thousand ($100,000.00) Dollars, to be paid on or before four (4) years from the date hereof in accordance with the provisions of this agreement.

(b) The purchase price shall be reduced by the amount of all royalties paid under the lease provisions of this agreement, up to the time the option is exercised.

(c) This option is dependent upon compliance by second party with all of the terms and conditions of lease provisions included in this agreement.

2. During the time this agreement is in effect first party does hereby demise, lease and let to second party all of said property for the purpose of conducting mining operations and of extracting and shipping ores and minerals therefrom, upon the following terms and conditions, to-wit:

(a) Second party will go into immediate possession of said property and will do and perform in or upon or for the purpose of reaching into said property at least seventy-five (75) shifts of labor per month; such labor may be performed by second party either upon the ground hereby leased or in second party's Electric Tunnel which is being driven towards and is expected soon to reach first party's property, and it is the intention of the parties hereto that the work herein provided for, to the extent that it may be necessary, shall be applied as and for annual assessment work to be done upon the aforesaid unpatented mining claims. The second party shall file proof of labor each year. And, further, second party, on its title to the Electric Tun-

nel and the property through which it runs, hereby grants to first party a perpetual easement to work and develop its property through the said Electric Tunnel, including an easement for dumping and constructing ore bins at or near the portal of the tunnel, and the right of ingress and egress to and from said tunnel. The grant of this tunnel right and easement shall be effective on the termination of this contract.

[fol. 42] (b) All work on said property shall be done in accordance with good mining practice and with a view to the development and preservation of said property for permanent mining purposes.

(c) Until payment of the purchase price provided for herein, second party will pay to first party on all ores extracted and removed from said property, the following royalties:

When the value is $5.00 per ton or less—5%
When the value is $5.01 to $10.00 per ton—7½%
When the value is $10.01 to $15.00 per ton—10%
When the value is $15.01 to $20.00 per ton—15%
When the value is over $20.01 per ton—20%

Said royalty payments to be based upon net returns which shall mean the gross returns less transportation, treatment, assaying and sampling charges.

(d) All ores and minerals extracted and removed from said property by second party, shall be shipped or sold by second party to such mills, smelters or purchasers as may from time to time be agreed upon, the same to be sold to the best advantage possible; or such ores and minerals may be taken and treated by second party at its mill at Mercur, Utah, provided that second party shall meet competitive bids for such ores and minerals. Provided, further, if the ore shall be milled in a mill owned or controlled by second party, only a reasonable charge shall be made for such milling, which shall be no more than is charged other customers.

(e) Second party will instruct said purchaser to forward to the escrow holder, hereinafter named, first party's royalty and to pay the balance to second party; said escrow holder shall forthwith make remittances to and account with

first party. A copy of return sheet or sheets shall accompany each remittance.

(f) Second party shall be solely responsible for all labor, materials, and supplies furnished for the equipment and/or operation of the said property, and shall keep said property, and every part thereof, free and clear of mechanic's liens or other incumbrances for or on account of any such labor, materials or supplies so furnished.

(g) Second party will indemnify and save harmless the first party of and from any liability, cost or expense that may arise by reason of damage or injury to any employee of second party occur-ing in the operations of second party under this agreement; but second party shall be notified of the commencement of any suit and shall have the right to defend the same. Also second party, in the conduct of its operations, will comply with the labor laws and the workmen's compensation laws of the State of Utah.

[fol. 43] (h) Second party will keep posted in conspicuous places on said property notices to inform all parties that may have any interest therein of the responsibility assumed by second party under the two preceding paragraphs.

(i) First party, or its agents, at all reasonable times may enter upon or into any of the premises described herein for the purpose of inspection, examination, survey and sampling, and shall have the right to have a representative present for the purpose of examining into all mining and milling operations, including sampling and assaying. The books and records of said second party respecting all ore mined from the property of the first party, and milled by it, shall be open for inspection of first party or its agents.

(j) Second party will pay all property taxes assessed and levied during the life of this agreement; each party hereto is to pay its own State and Federal income tax and its pro rata of net proceeds taxes.

3. Upon termination of this agreement by forfeiture or otherwise, second party shall have the right of removal of all equipment, machinery, tools and supplies placed on said property by said second party, such right of removal to be exercised within ninety (90) days after such termination; provided, however, second party shall first pay to first party all sums or amounts due to first party under this

agreement and accrued up to the time of such termination; provided further, no timbering or track shall be removed.

4. Time is of the essence of this agreement, and if second party fails to keep and perform the conditions and covenants herein stated upon its part to be kept and performed, then at the option of first party this agreement may be declared null and void and the respective rights and obligations of the parties hereto at an end; provided, however, that first party first gives to second party a written notice specifying the default or violation complained of, placed in an envelope and addressed to second party at Salt Lake City, Utah, with postage thereon prepaid and duly registered, and if second party fails for thirty (30) days from the date of mailing such notice to remedy such default, then this agreement shall forthwith terminate and become null and void, and first party shall retain as liquidated damages all moneys theretofore paid by second party; provided, no notice need be given of the non-payment of royalties.

5. Second party may abandon its rights under this agreement by surrendering said property and returning same to first party in as good condition as when received, acts of God and the elements and the reasonable and proper operations of second party under this agreement excepted, upon giving to first party thirty (30) days' notice in writing of its intention to do so.

[fol. 44] 6. When the sum of Five Thousand ($5,000.00) Dollars shall have been paid upon the purchase price herein provided for, first party will, upon request from second party, execute a special warranty deed, warranting title as against the acts and omissions of first party to convey the aforesaid property and property rights, naming second party as grantee, said deed to be deposited in escrow with Continental National Bank & Trust Company, Salt Lake City, Utah, with instructions to deliver same to second party when the purchase price of One Hundred Thousand ($100,000.00) Dollars is fully paid. Upon cancellation of this agreement for failure of second party to comply with its terms and conditions, said deed shall be returned to first party. A copy of this agreement shall be deposited with the escrow holder for its guidance.

7. This agreement shall in all things be binding upon and inure to the benefit of the successors and assigns of the parties hereto.

In Witness Whereof, said parties hereto have caused the due execution of this agreement the day and year first above written.

New Mercur Mining Company, By (Signed) J. H. Marshall, President. (First Party.) (Corporate seal.)

Attest: (Signed) Allen T. Sanford, Secretary.

The Snyder Mines Incorporated, By (Signed) George W. Snyder, Vice President.

Attest: (Signed) Guy Snyder, Secretary.

[fol. 45] PORTION OF EXHIBIT 7

Assignment

LEWISTON PEAK MINING COMPANY, a Corporation of Utah,

to

THE SNYDER MINES, INCORPORATED, a Corporation of Nevada

Recorded March 1, 1937

In Book "D" of Misc. p. 418

No. 205980

Dated July 2, 1936

Consideration "val. recd."

Assigns: All right, title, claim and interest in and to that certain Lease and Option to purchase Agreement dated June 11, 1934, between George H. Dern, George E. Airis and Arthur W. Chesterton, as surviving directors of and trustees for Consolidated Mercur Gold Mines Company, first parties therein, and said Lewiston Peak Mining Company, second party therein, which agreement was recorded on June 19, 1934, in Book "D" of Mining claims, pages 156-9, inclusive, records of Tooele County, Utah, and which agreement was modified by letter agreement dated June 15, 1934, and said Lewiston Peak Mining Company hereby conveys and quit claims to said The Snyder Mines, Incor-

porated, all of its right, title, claim and interest in and to the property in said agreement described.

(Signed) Lewiston Peak Mining Company, by E. H. Snyder, President. (Corp. Seal.)

Attest: Guy Snyder, Secretary.

STATE OF UTAH,
County of Salt Lake, ss:

On this 2nd day of July, 1936, personally appeared before me, E. H. Snyder, who being by me duly sworn did say that he is the President of Lewiston Peak Mining Company, a corporation, the signer of the foregoing instrument, and that said instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and said E. H. Snyder duly acknowledged to me that said corporation executed same.

(Signed) Ruth Glissmeyer, N. P.

[fol. 46] EXHIBIT 8-A

Lease and Option to Purchase

This Agreement made and entered into in duplicate this 11th day of June, 1934, by and between George H. Dern, George E. Airis and Arthur W. Chesterton, being the surviving directors of and trustees for Consolidated Mercur Gold Mines Company, formerly a corporation organized under the laws of the State of New Jersey, first party, and Lewiston Peak Mining Company, a corporation organized under the laws of the State of Utah, second party,

Witnesseth:

Whereas, Consolidated Mercur Gold Mines Company was formerly a corporation duly organized and existing under the laws of the State of New Jersey and duly qualified to do business in the State of Utah; and

Whereas, said corporation was dissolved by proclamation of the Governor of the State of New Jersey approximately eighteen (18) years ago because of said corporation's failure to pay franchise taxes; and

Whereas, the laws of New Jersey provide that all corporations, no matter in what manner they may be dissolved, shall be continued bodies corporate for the purpose of en-

abling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established; and

Whereas, the laws of the State of New Jersey further provide that upon dissolution in any manner of any corporation the directors shall be trustees thereof with full power to settle the affairs, collect the outstanding debts, sell and convey the property and divide the moneys and other property among the stockholders after paying its debts as far as such moneys and property shall enable them, and that such directors as trustees shall have the power to meet and act under the by-laws of the corporation and under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, which sale may be for cash or partly on credit; and

Whereas, said dissolved corporation at the time of its dissolution was the owner of, or had an interest in, certain mining property and property rights hereinafter described situated in Tooele and Utah Counties in the State of Utah, which have never been sold, encumbered or otherwise disposed of although the surviving directors of said corporation have endeavored constantly since the dissolution of said corporation to sell said property and rights upon terms which would be beneficial to the stockholders of said dissolved corporation; and

[fol. 47] Whereas, the surviving directors, now have an opportunity to enter into an agreement looking toward the sale of said property and rights, the consummation of which would permit the winding up of the affairs and business of said dissolved corporation; and

Whereas, the second party desires to obtain a lease and option to purchase all of said property and rights upon the terms and conditions hereinafter stated; and

Whereas, said surviving directors believe this agreement is fair and equitable to the stockholders of said dissolved corporation and, therefore, in performance of the duties imposed upon them by the laws of New Jersey, said surviving directors have entered into this agreement; and

Whereas, the property and rights hereinbefore referred to may be more particularly described as follows, to-wit:

Mercur Group of Patented Mining Claims, to-wit:

	U. S. Lot No.
Mercur	57
Resolute No. 2	62
Nimrod	63
Southside No. 2	65
Apex	66
Ruby	67
Apex No. 2	68
Ralph	69
Fremont	70
Lulu	71
Mattie No. 4	3110
Mattie No. 5	3111
Keystone	3112

Brickyard Group of Patented Mining Claims, to-wit:

Protective Tariff Lady May Vulture Sullivan	74

Brickyard Group of Patented Mining Claims, to-wit:

Brickyard Potosi Justice Arab	72
Snowflake	3246

[fol. 48] Yankee Girl Group of Patented Mining Claims, to-wit:

	U. S. Lot No.
Dolly Varden John Adam Yankee Girl Yankee Girl Fraction Custer No. 2 Miller Miller Fraction Yankee Girl No. 2	3403

White Squadron Group of Mining Claims, to-wit:

Buffalo Buffalo Fraction De Rouche Frances My Emma My Emma No. 1 Cedar Grove Cedric Cedric No. 2 Cedric No. 3 Coolgardie Molly Bawn	3512
Merrett Merrett No. 1 Merrett No. 2	3290
Old Guard	
Genevieve	3511
Lehi	3320
Little Vee	3284

An undivided one-half interest in and to,

Gold Flat Rover No. 4	3284

Golden Gate Group of Patented Mining Claims: to-wit:

B. B. Magpie Surprise	2977
Exchequer Rob Roy	2970
Hard Times Hard Times No. 2 Hard Times No. 3 Fourth of Sept.	3136
Fundamental	3078

[fol. 49]

	U. S. Lot No.
Grasshopper Noonday Mabel	2948
Hard Times No. 4	3328
Independence Defiance	3087
Navigator Wedge of Gold	2984
Ortega	3291
Plutarch	2982
Tempest	3321

Together with the tailings dumps thereon located and all appurtenances thereunto belonging, all water and water rights, and including lodes, veins and ledges in and upon said mining claims with their dips, spurs, angles and variations.

The intention of the parties is that this agreement shall apply to and effect all of the mining property and rights appurtenant thereto which the party of the first part owns or has an interest in and situate in Tooele County and Utah County, Utah, except that property in Utah County described in Lease and Option Agreement to W. F. Snyder and Sons Company affecting the Manning Dumps and Dated December 30, 1932.

Now therefore, in consideration of the premises and the sum of $500.00 cash and promissory note due October 1, 1934, for the sum of $4,500.00 (said note to be indorsed and guaranteed by W. F. Snyder & Sons Company) to be paid and delivered by second party to first party at the time of the execution hereof, and the covenants and agreements to be kept and performed by each of the parties respectively, the parties hereto do mutually agree as follows; to-wit:

1. First party does hereby give and grant to second party the right and option to purchase all of said property, upon the following terms and conditions:

(a) The total purchase price is $375,000.00, $5,000.00 of which has been paid or provided for as hereinbefore stated,

and the balance of $370,000.00 is to be paid on or before March 1, 1954, to the escrow holder hereinafter named, for the account of first party. Said escrow holder shall forthwith pay to first party all amounts so received by it for the account of the first party.

(b) The purchase price shall be reduced by the amount of all royalties paid up to the time the option is exercised, and by any amounts which may be advanced or reasonably expended by the second party, as provided in paragraph 6 hereof, to prepare abstracts of title or to perfect titles with respect to the property covered hereby.

[fol. 50] (c) This option is dependent upon compliance by second party with all the terms and conditions of lease provisions included in this agreement.

2. During the period of time this agreement is in force first party does hereby demise, lease and let to second party all of said property for the purpose of extracting and shipping ores and minerals from said mining property and claims, and for the purpose of treating said tailings dumps by milling or other methods to secure and recover therefrom any materials of value, upon the following terms and conditions, to-wit:

(a) Second party will go into immediate possession of said property and will do and perform on said mining claims not less than 150 shifts of labor per month, commencing on June 1, 1934, and will proceed to sampling the mine and tailings dumps, and to obtain geological information for the development of said property and will conduct metallurgical tests for the development of a process for treating the ore and tailings. Second party agrees to expend on or before July 1, 1937, the sum of at least $150,000.00 in developing and equipping the property herein referred to and/or in building a suitable mill for the treatment of the ore and tailings to be extracted therefrom or located thereon, and that all expenditures made by second party in complying with the requirements of this paragraph shall apply upon said $150,000.00.

(b) All work on said tailings dumps and in and on said mining property shall be done in accordance with good mining and milling practice.

(c) Until payment of the purchase price provided for herein, second party will pay to first party a royalty of 5% on all ore and tailings milled to be computed on the basis of net returns on all bullion, slag, precipitates, concentrates, or other milled products, and a royalty of 7½% of the net returns on all crude ores sold to smelters. For the purpose of this paragraph, net returns with respect to milled products means the value of such products as paid for by the purchaser thereof after deducting the cost of transportation, assaying, and other expenses incidental to the marketing of said product, but not including any cost of transportation, assaying or other expenses incurred prior to or in connection with the milling thereof. Net returns with respect to crude ore sent to smelters shall mean the amount received by second party from the smelter, or purchaser, less transportation, treatment, assaying and sampling charges.

(d) After January 1, 1936, second party shall pay to first party, either as royalty or as part of the purchase price provided for herein, at least One Thousand ($1,000.00) Dollars per month; provided that whenever earned royalties exceed said sum of $1,000.00 per month the excess shall apply against future minimum royalty requirements during the current calendar year. In case such monthly payments are not made, first party, may, at its option, declare this agreement at an end, and second party shall forfeit all its rights herein.

[fol. 51] (e) All shipments of products from treating said tailings dumps and all ores extracted from said mining claims shall be made by second party to such mills, smelters or purchasers as may from time to time be mutually agreed upon, the same to be sold at the highest price obtainable.

(f) Second party will instruct said purchaser to forward to the escrow holder hereinafter named first party's royalty and to pay the balance to second party; said escrow holder shall forthwith make remittances to and account with first party care of George H. Dern, War Department, Washington, D. C., or such other address or person as he may designate. A copy of return sheet or sheets shall accompany each remittance.

(g) Second party shall be solely responsible for all labor, materials, and supplies furnished for the equipment and/or

operation of the said property, and shall keep said property, and every part thereof, free and clear of mechanic's liens or other incumbrances for or on account of any such labor, materials or supplies so furnished.

(h) Second party will indemnify and save harmless the first party of and from any liability, cost or expense that may arise by reason of damage or injury to any employee of second party occurring in the operations of second party under this agreement; but second party shall be notified of the commencement of any suit and shall have the right to defend the same. Also second party, in the conduct of its operations, will comply with the labor laws and the workmen's compensations laws of the State of Utah.

(i) Second party will keep posted in conspicuous places on said property notices to inform all parties that may have any interest therein of the responsibility assumed by second party under the two preceding paragraphs.

(j) First party or its agents, at all reasonable times, may enter upon or into any of the premises described herein for the purpose of inspection, and shall have the right to have a representative present for the purpose of examining into all mining and milling operations.

(k) All property and net proceeds taxes assessed and levied for the year 1934 and thereafter during the life of this agreement shall be paid by second party; each party hereto is to pay its own State and Federal income tax.

(l) Second party will send monthly to first party, c/o George M. Dern, War Department, Washington, D. C. (or to any other address or person designated by first party), a report, in form satisfactory to first party, containing information regarding the mining and milling operations conducted on the property.

3. Upon termination of this agreement by forfeiture or otherwise, second party shall have the right of removal of [fol. 52] all equipment, machinery, tools and supplies placed on said property by said second party, such right of removal to be exercised within ninety days after such termination; provided, however, second party shall first pay to

first party all sums or amounts due to first party under this agreement and accrued up to the time of such termination.

4. Time is of the essence of this agreement, and if second party fails to keep and perform the conditions and covenants herein stated upon its part to be kept and performed, then at the option of first party this agreement may be declared null and void and the respective rights and obligations of the parties hereto at an end; provided, however, that first party first gives to second party a written notice specifying the default or violation complained of, placed in an envelope and addressed to second party at Salt Lake City, Utah, with postage thereon prepaid and duly registered, and if second party fails for thirty days from the date of mailing such notice to remedy such default, then this agreement shall forthwith terminate and become null and void, and first party shall retain as liquidated damages all moneys theretofore paid by second party.

5. Second party may abandon its rights under this agreement by surrendering said property and returning same to first party in as good condition as when received, acts of God and the elements and the reasonable and proper operations of second party under this agreement excepted, upon giving to first party thirty days notice in writing of its intention so to do.

6. First party will within 60 days after the execution hereof, execute a quit claim deed to convey the property and property rights herein described, naming second party herein as grantee; said deed to be deposited in escrow with Continental National Bank and Trust Company, Salt Lake City, Utah, with instructions to deliver said deed to second party when the entire purchase price of $375,000.00 has been paid and upon full compliance by second party with all the terms and conditions of this agreement. Upon cancelation of this agreement or upon failure of second party to comply with its terms and conditions the said deed shall be returned to first party. A copy of this agreement shall be deposited with said escrow holder for its guidance.

First party will cooperate with second party in order to prepare or obtain such abstracts of title as the second party may desire.

First party likewise agrees to take any steps reasonably requested by second party for the perfection of the titles to said property and further agrees in case it fails to take such steps within a reasonable time second party may take the necessary action in such regard. Any expense incurred by either party in preparing or procuring abstracts of title or in perfecting titles pursuant to this paragraph 6 shall be borne by the second party.

[fol. 53] 7. During the time this agreement is in force second party shall have the right to use any water available on said described properties that is necessary to the operation of its milling plant or plants.

8. This agreement shall in all things be binding upon and inure to the benefit of the successors and assigns of the parties hereto; provided, however, that this agreement may not be assigned by the second party without the written consent of the first party.

9. No recital of fact contained herein shall be construed as a representation or warranty made by the surviving directors of said dissolved corporation. Such surviving directors believe and have been advised by counsel that they have full power and authority to enter into this agreement, but they make no representation or warranty to second party as to the existence or extent of such power and authority, it being understood between the parties to this agreement that if it should ever be determined that the surviving directors executing this agreement did not have the proper authority to do so, neither such directors, nor their legal representatives, shall be held personally liable in any manner whatsoever to second party or its successors or assigns. It is also understood and agreed between the parties that such surviving directors executing this agreement are acting solely in their representative capacity and are not acting in their individual capacities, and that such surviving directors shall not be held to any personal liability under or by reason of any of the provisions hereof.

In Witness Whereof, said parties hereto have caused the due execution of this agreement the day and year first above written.

(S.) George H. Dern, Arthur W. Chesterton, George E. Airis, as surviving directors of and trustees for Consolidated Mercur Gold Mines Company, First Party.

Approved by: Bertha R. Glendinning, Robert G. Glendinning.

Attest: (S.) H. Van Dam, Jr., Asst. Secretary.

Lewiston Peak Mining Company, by E. H. Snyder, President, Second Party. (Seal.)

[fol. 54] STATE OF UTAH,
County of Salt Lake, ss:

On this 11th day of June, 1934, personally appeared before me E. H. Snyder, who being by me duly sworn, did say that he is President of Lewiston Peak Mining Company, a corporation, one of the parties to the foregoing agreement and that said agreement was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and said E. H. Snyder duly acknowledged to me that said corporation executed the same.

(S.) C. A. Selby, Notary Public, Salt Lake City, Utah.

Conformed Copies—

Recorded in Tooele County, Utah, June 19, 1934, in Book "D" of Miscellaneous, pages 156-159, inclusive, as No. 198461.

[fol. 55] IN THE SUPREME COURT OF THE STATE OF UTAH

[Title omitted]

PRAECIPE INDICATING PORTIONS OF THE RECORD ON APPEAL TO BE INCORPORATED INTO THE TRANSCRIPT FOR THE SUPREME COURT OF THE UNITED STATES—February 20, 1943

To the Clerk of the Above Entitled Court:

South Mercur Mining Company, Defendant and Appellant above named, hereby designates and requests you to

transcribe and certify the following material portions of the record to be incorporated into the Transcript of Record to be transmitted to the Supreme Court of the United States to accompany the Petition for a Writ of Certiorari in said cause to be filed in said Court by said Defendant and Appellant:

1. Amended Complaint in the District Court of Tooele County
2. Answer to Amended Complaint and Counterclaim
3. Plaintiffs Reply
4. Defendants Reply to Reply
5. Findings of Fact and Conclusions of Law by the District Court of Tooele County
6. Decree of District Court of Tooele County
7. Notice of Intention to Move for New Trial
8. Order Denying New Trial
9. Notice of Appeal to Supreme Court of the State of Utah
10. Opinion of Supreme Court of Utah
11. Judgment of Supreme Court of Utah
12. Order of Supreme Court of Utah Denying Petition for Rehearing

[fol. 56] 13. The following portions of the bill of exceptions:

All of P. 98;
P. 100, L. 7—23;
P. 101, L. 8—P. 102, L. 25;
P. 103, L. 16—20;
P. 104, L. 1—P. 106, L. 26;
P. 146, L. 13—17;
P. 147, L. 25—P. 148, L. 14;
P. 148, L. 28—P. 149, L. 10;
P. 150, L. 2—4 and L. 17—19;
P. 150, L. 28—P. 151, L. 7;
P. 151, L. 27, 28;
P. 159, L. 4—15;
P. 255, L. 7—12;
P. 262, L. 9—14;
P. 291, L. 5—10 and L. 16—23;
P. 292, L. 15—P. 293, L. 3;
P. 308, L. 12—19;

P. 309, L. 19—26;
P. 310, L. 4—8; and
P. 311, L. 7—10;

all line designations being inclusive and all page references being to the Record on Appeal in Supreme Court of Utah.

14. Exhibit 6
15. P. 89 of Exhibit 7
16. Exhibit 8-A
17. Exhibit 9
18. Exhibit 14

The portions of the record designated herein are intended to constitute the record in the Supreme Court of the United States upon Petition for Writ of Certiorari to be filed by said Defendant and Appellant and for review upon said Writ of Certiorari, if granted. Said portions of the record are all of the material portions thereof necessary to a proper presentation and consideration in the Supreme Court of the United States of the questions presented by the Petition for Certiorari.

Said transcript is to be prepared as required by law and the rules of this court and the rules of the United States Supreme Court concerning Writs of Certiorari and [fol. 57] to be immediately filed in the office of the Clerk of the Supreme Court of the United States in Washington, D. C.

Dated this 20th day of February, 1943.

M. Q. Van Colby, Clair M. Senior, Raymond T. Senior, Attorneys for Appellant.

Received copy of the foregoing Praecipe together with copy of petition for Writ of Certiorari this 20th day of February, 1943.

N. Van Dam, Attorney for Respondents.

[fol. 58] Clerk's Certificate to foregoing transcript omitted in printing.

FILED
MAR 3 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 781

SOUTH MERCUR MINING COMPANY, A CORPORATION,
Petitioner,

vs.

NEW MERCUR MINING COMPANY, A CORPORATION, AND THE SNYDER MINES, INCORPORATED, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

W. Q. VAN COTT,
CLAIR M. SENIOR,
RAYMOND T. SENIOR,
Counsel for Petitioner.

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Lindley on Mines, Third Edition, Vol. 2, Sec. 624, pp. 1532-1533 18
Lindley on Mines, Third Edition, Vol. 2, Sec. 630, p. 1552 17
Snyder on Mines, Vol. 1, Sec. 480, p. 444 17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 781

SOUTH MERCUR MINING COMPANY, A CORPORATION,
Petitioner,

vs.

NEW MERCUR MINING COMPANY, A CORPORATION, AND THE SNYDER MINES, INCORPORATED, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of South Mercur Mining Company respectfully shows:

Summary and Short Statement of Matter Involved.

The United States Statute (R. S. 2324, Title 30, U. S. Code, Sec. 28) requires the performance of $100.00 annual labor for each unpatented mining claim upon the public domain in order to prevent forfeiture of the claim by relocation by a third party, providing that upon a failure to comply with such requirement a claim shall be open to relocation in the

same manner as if no location thereof had ever been made. It further provides that where claims are held in common such expenditure may be made upon any one claim. The Supreme Court of Utah has adjudged that the requirements of this statute are satisfied as to unpatented mining locations owned by one party, by work done by a second party, in mine workings on nearby patented mining claims owned by a third party, there being no contractual relationship of any sort between the owner of the unpatented claims and the owner of such patented claims and the workings thereon (R. 18-30). Thus work away from the unpatented claims in question upon property of a third party is held to be applicable as assessment work for the unpatented claims whose owner had no ownership in or right to the use of the property or workings where the work was performed.

Respondents commenced this action to quiet title in the District Court of Tooele County, Utah, asserting ownership, possession and right to possession of twelve unpatented lode mining claims on the public domain of the United States in Tooele County, Utah, to be in respondent New Mercur Mining Company, which had granted a lease and option thereon to respondent The Snyder Mines, Incorporated, and that petitioner was wrongfully asserting an adverse interest therein (R. 1-2). Petitioner duly filed its answer and counterclaim, asserting its ownership of the property in question by virtue of unpatented mining claims thereon, located after 12 o'clock noon September 1, 1939, pursuant to the United States statute and resulting in forfeiture of all rights under the locations of New Mercur Mining Company in that the latter company failed to perform the annual assessment work for the period ending at noon September 1, 1939 (R. 3-9).

Petitioner contends that assessment work for the New Mercur claims was not done or commenced prior to noon

on September 1, 1939, and that therefore petitioner's relocations of the ground were valid. The only circumstances relied on by the Supreme Court of Utah (R. 18, 26) in holding that work done in other ground and by another person satisfies the statute are that respondent New Mercur Mining Company on August 28, 1939, granted a lease and option (Exhibit 6, R. 9, 13, 34, 39-45) on the unpatented claims in question to The Snyder Mines, Incorporated, and that the Consolidated Mercur Gold Mines Company sometime before had also granted a lease and option (Exhibit 8-A, R. 18, 34, 35, 39, 46-56) to The Snyder Mines, Incorporated, on patented property owned by Consolidated Mercur (R. 35) under which operations in the Consolidated Mercur property were being conducted by The Snyder Mines, Incorporated (R. 22). The Consolidated Mercur Company in its lease and option to The Snyder Mines, Incorporated, did not grant it any right to create any easements or rights of user in Consolidated Mercur ground (R. 46-56) and the Supreme Court of Utah did not conclude or assume that The Snyder Mines, Incorporated, had any such right or power (R. 18-30). Nevertheless it held that the work done by The Snyder Mines, Incorporated, prior to noon September 1, 1939, and thereafter in conducting its operations on the property of Consolidated Mercur Company away from the unpatented claims of the New Mercur Mining Company was applicable under the United States statutes as assessment work for the New Mercur claims. It relied for the necessary common ownership and community of interest upon the facts that there was a common lessee and optionee holding by independent instruments certain rights as to the unpatented mining locations of the respondent New Mercur Mining Company and as to the patented mining claims of the Consolidated Mercur Company in spite of the fact that there was no contractual relationship whatsoever between respondent New Mercur

Mining Company and the Consolidated Mercur Company (R. 26-27).

Jurisdictional Statement.

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. Code, Section 344.

(b) The statutes of the United States construed and applied by the Supreme Court of Utah are U. S. Code, Title 30, Section 28 (R. S. 2324) and the Act of June 30, 1939 (c. 257, 53 Stat. 991). The pertinent provisions of said statutes are set forth at length in the brief in support of this petition.

(c) The judgment of the Supreme Court of Utah was rendered July 11, 1942 (R. 31). The petition for rehearing was denied December 3, 1942 (R. 31). This petition for writ of certiorari was filed March 3, 1943.

Question Presented.

The question presented is whether the Supreme Court of Utah properly construed and applied the United States statute (R. S. 2324), Title 30, U. S. Code, Section 28, in holding that work performed in workings off the unpatented claims in question suffices as annual assessment work to hold the unpatented claims where there is no common ownership of the property where the work was done and the unpatented claims for which the work is asserted and no community of interest in the workings which makes it possible for the owner of the unpatented claims to extend and use the workings in question for the development of the unpatented claims.

Reasons Relied On for Allowance of Writ.

The Supreme Court of Utah has decided a Federal question of substance and importance not heretofore determined

by the Supreme Court of the United States. The decision of the Supreme Court of Utah is inconsistent with the policy and purpose of the United States statute. It is not in accord with the principles of applicable decisions of the Supreme Court of the United States. It is contrary to decisions of the General Land Office of the Department of the Interior. The effect of the decision is to open the door to gross and widespread abuses, to permit avoidance of annual assessment work merely by entering into a contract with one who is doing work on a neighboring and independently owned property. Nothing but paper work is done. Mining ground on the public domain is not explored or developed. Minerals are not produced. Ground is held by dog in manger tactics by one who actually does nothing and expends nothing from others who could otherwise develop it and produce minerals. Thus the policy behind the United States statute is circumvented.

Wherefore, your petitioner prays that a writ of certiorari be issued by this Court to the Supreme Court of Utah to the end that the judgment of said court may be reviewed by this Honorable Court.

SOUTH MERCUR MINING
COMPANY,
By W. Q. VAN COTT,
1311 Walker Bank Bldg.,
Salt Lake City, Utah.
CLAIR M. SENIOR,
RAYMOND T. SENIOR,
1120 Newhouse Building,
Salt Lake City, Utah,
Its Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Courts Below.

The trial court rendered its Findings of Fact, Conclusions of Law and Decree on October 15, 1940. (R. 12-16.) The opinion is unreported. The opinion of the Supreme Court of Utah (R. 18-30) is reported in 128 Pac. (2d) 269 (Utah Report not yet published).

Grounds On Which Jurisdiction of Supreme Court of the United States Is Invoked.

The judgment of the Supreme Court of Utah was rendered on July 11, 1942 (R. 31). Petition for rehearing was denied on December 3, 1942. (R. 31). The Petition for Writ of Certiorari was filed March 3, 1943. The judgment of the Supreme Court of Utah is based upon its construction and application of a United States statute, Section 2324 Revised Statutes, Title 30, U. S. Code, Section 28. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 937, 28 U. S. Code Sec. 344 and the Act of February 13, 1925, c. 229, Sec. 8, 43 Stat. 940, 28 U. S. Code Sec. 350.

Statement of the Case.

In March, 1931, the Violet Ray Nos. 1 to 12 lode mining claims of respondent New Mercur Mining Company were located upon the public domain of the United States. (R. 9, 32.) On August 28, 1939, a Lease and Option Agreement (Exhibit 6, R. 9, 13, 18, 34, 39-45) covering these unpatented claims was entered into between respondent

New Mercur Mining Company and respondent The Snyder Mines, Incorporated. After noon September 1, 1939, petitioner, South Mercur Mining Company, located the Protection Nos. 1 to 15 lode mining claims covering the area theretofore embraced within the Violet Ray locations. (R. 4, 14, 18, 38-39.)

In November, 1939, respondents New Mercur Mining Company and The Snyder Mines, Incorporated, commenced this action in the District Court of Tooele County, Utah, to quiet title in respondent New Mercur Mining Company to said Violet Ray locations. (R. 1-2, 18.) Petitioner, named as the defendant in such proceeding, answered and counterclaimed asserting that the ground embraced within the Violet Ray locations was, after 12 o'clock noon September 1, 1939, open to location because of failure to perform for the Violet Ray locations the annual assessment labor required for the assessment period ending at 12 o'clock noon September 1, 1939, and that the Violet Ray locations were forfeited by the location of the Protection claims. (R. 3-9, 18.)

The Snyder Mines, Incorporated, was on September 1, 1939, and for a substantial period prior thereto had been, carrying on mining operations through the so-called "electric tunnel" on the patented property of the Consolidated Mercur Gold Mines Company. (R. 22-23.) These operations were conducted under a Lease and Option (Exhibit 8-A) granted by the Consolidated Mercur Gold Mines Company on June 11, 1934, to the Lewiston Peak Mining Company and on July 2, 1936 (R. 18, 34, 35, 39, 46-56), assigned by the latter to The Snyder Mines, Incorporated. (R. 45.)

The Supreme Court of Utah found and held that the only work which could be applicable as assessment work for the Violet Ray locations was "an extension of the 'electric tunnel' by leasers under lease No. 259 in a southeast-

erly directed toward the Violet Ray claims." (R. 20.) Lease 259, whereunder leasers of The Snyder Mines, Incorporated, were mining, had been in operation since March of 1939. (R. 22.)

The Supreme Court of Utah stated: "The question, then, of whether the New Mercur Mining Company suffered a forfeiture by appellant's act of relocating at 12 o'clock noon September 1, 1939, turns upon the activities of respondent, Snyder Mines, Incorporated, in the southeast heading of the 'electric tunnel' on or before 12 o'clock noon of September 1, 1939." (R. 21.)

The Supreme Court of Utah resolved this question in favor of respondents and thereby held that the requirements of the United States Statute (Title 30 U. S. Code Sec. 28) were satisfied as to the unpatented Violet Ray locations owned by one party (respondent New Mercur Mining Company) by work done by a second party (respondent The Snyder Mines, Incorporated) in mine workings ("electric tunnel") on nearby patented mining claims owned by a third party (Consolidated Mercur Gold Mines Company), although there was no contractual relationship of any sort between the respondent New Mercur Mining Company, the owner of the unpatented mining claims, and Consolidated Mercur Gold Mines Company, the owner of such patented mining claims and workings thereon. This case involves the question of whether the Utah Supreme Court correctly construed and applied the Federal statute in so holding. The Utah Supreme Court expressly recognized that its holding was "not free from doubt" (R. 26).

Statement of Error.

The Supreme Court of Utah erred in holding that work performed for The Snyder Mines, Incorporated on property of Consolidated Mercur Gold Mines Company was appli-

cable as annual assessment work required by the United States statute for the Violet Ray Nos. 1 to 12 unpatented lode mining claims of New Mercur Mining Company.

ARGUMENT.

United States Statutes Involved.

The pertinent statutory provisions involved in this case are U. S. Code, Title 30, Sec. 28 (R. S. 2324) and the Act of June 30, 1939 (c. 257, 53 Stat. 991).

U. S. Code, Title 30, Sec. 28 (R. S. 2324) includes the following provisions:

> * * * On each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent shall fail or refuse to contribute

his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922.

The Act of June 30, 1939 (c. 257, 53 Stat. 991) reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to comply with the provisions of section 2324 of the Revised Statutes of the United States, which requires on each mining claim located, and until a patent has been issued therefor, not less than $100 worth of labor to be performed or improvements aggregating such amount to be made each year, it shall be sufficient, for the year beginning at 12 o'clock meridian July 1, 1938, if such work or improvements are in good faith commenced on or before 12 o'clock meridian September 1, 1939, and prosecuted with reasonable diligence to completion.

Opinions by the Supreme Court of the United States On the Policy and Meaning of These Statutes.

This Court has not decided the precise question involved. Its decisions, however, clearly show that the decision of the

Supreme Court of Utah is inconsistent not only with the express statutory provisions but with the policy and purpose underlying the statute.

Chambers v. *Harrington*, 111 U. S. 350, 28 L. Ed. 452, 4 S. Ct. 428.

After referring to the statute in question the court, on page 353, said:

> These mineral lands being thus open to the occupation of all discoverers, one of the first necessities of a mining neighborhood was to make rules by which this right of occupation should be governed as among themselves; and it was soon discovered that the same person would mark out many claims of discovery and then leave them for an indefinite length of time without further development, and without actual possession, and seek in this manner to exclude others from availing themselves of the abandoned mine. To remedy this evil a mining regulation was adopted that some work should be done on each claim in every year, or it would be treated as abandoned.
>
> In the statute we are considering, Congress, when it came to regulate these matters and provide for granting a title to claimants, adopted the prevalent rule as to claims asserted prior to the statute, and as to those made afterwards it required one hundred dollars' worth of labor or improvement to be made in each year on every claim. Clearly the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger.

Jackson v. *Roby*, 109 U. S. 440, 27 L. Ed. 990, 3 S. Ct. 301.

After referring to the statute in question the court on page 445 said:

> * * * In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case the expenditures required may be made, or the labor be performed, upon any one of them.

Departmental Rulings.

The decision of the Utah Supreme Court is inconsistent with the rulings of the United States Department of Interior and General Land Office with respect to the United States statute.

In *Smith, et al.* v. *Van Clief, et al.*, 6 Copp's Land-Owner 2, 3, the Secretary of the Interior stated:

> The purpose of the requirement of the law was to obviate an abuse which has assumed formidable proportions in the mining regions. In the early history of mining operations in this country, it was the universal practice of miners to assemble together and make laws for the government of the mining district where they resided. These laws were generally very liberal in the matter of possessory rights and titles, and great areas of land were covered by duly recorded mining claims, upon which no work had been done or improvements made for a long series of years.
>
> Under the rulings of the local courts these claims operated as a cloud upon the title to the land, and retarded the progress and development of the mining industries of the country. In order, therefore, to put an end to this abuse, and encourage the purchase of the lands, from the government, and the consequent establishment of permanent industries, Congress wisely provided that possessory rights should exist only as long as the specified amount of work was annually performed.
>
> The object of the law being to encourage the purchase of mineral lands, it would be manifestly improper for

this Department to so construe the law as to destroy the purpose which Congress had in view in enacting it.

The requirements of the United States statute with regard to application of work performed away from the claim are stated by the Interior Department headnote and decision in the case of *Black Lead Lode Extension*, 32 L. D. 595, 597, as follows:

> No part of the value of work done or improvements made upon a group of contiguous mining claims, in pursuance of a general system alleged to have been adopted for the common development of the group and an adjoining claim, can be accredited to the adjoining claim, toward meeting the requirement of Section 2325 of the Revised Statutes, relative to the expenditure of five hundred dollars, where any of the several owners of said claim is without interest in the group upon which the improvements are located. (Headnote.)
>
> The entrymen have not shown, nor do they claim, that the co-owners of Giuliani in the Black Lead Lode Extension ever, at any time, had an interest in the Susquehanna group of claims. There is not and was not at the date of the application for patent, therefore, a common ownership in the claim here in question and the claims composing the Susquehanna group, such as would constitute them a group of claims "held in common" within the meaning of the law. (See Golden Crown Lode, 32 L. D. 217, 220.)

The foregoing case involved patent expenditures, but in the case of *C. K. McCormick, et al.*, 40 L. D. 498, 501, the First Assistant Secretary of the Interior stated:

> In Zephr and Other Mining Claims, (30 L. D., 510, at 513), the Department said:
>
> "As, obviously, whatever may be credited as labor or improvements toward meeting the requirement relative to annual expenditure may also be credited toward the expenditure required to be shown by section

2325 as a condition precedent to the entry and patenting of a mining claim, it follows that the provisions of the law relating to annual expenditure, and the decisions of the courts construing or interpreting such provisions, may properly be resorted to to determine what expenditure in labor and improvements may be credited to such a claim or claims under that section."

In Chambers & Others *v.* Harrington & Another (111 U. S. 350), the Supreme Court stated the purpose of the requirement of an annual expenditure on page 353, as follows:

"Clearly the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger."

The ruling of the Interior Department in *Cronberg, et al.* v. *Hazlett,* 51 L. D. 101, 106, likewise clearly stated the necessity of common ownership as follows:

Credit toward compliance with the annual assessment work required by section 2324, Revised Statutes, can not be allowed for expenditures upon other claims of a group of which the one under consideration once formed a part, if the claimant had no interest in those other claims at the time that the expenditures thereupon were made. (Official Interior Department Headnote.)

The want of interest by the protestants in the tracts upon which said drilling operations were performed, and at the time of its performance, would, without regard to other objections that might be urged against the availability of the expenditures therefor, defeat the right of the protestants to have any part of such costs credited to the claim here involved as annual assessment work (Page 106).

In public land matters this Court has always given much weight to the rulings of the Interior Department.

Cramer v. *U. S.*, 261 U. S. 219, 43 S. Ct. 342, 344, 67 L. Ed. 622.

Midway Co. v. *Eaton*, 183 U. S. 603, 609, 22 S. Ct. 261, 264, 46 L. Ed. 347.

Hastings, etc. R. R. Co. v. *Whitney*, 132 U. S. 357, 366, 10 S. Ct. 112, 33 L. Ed. 363.

Other Authorities.

The Supreme Court of Idaho in *Kramer* v. *Settle*, 1 Idaho 485, 492, stated:

> It is a matter of public notoriety that the enterprise of many who might wish to work mines, is often discouraged by a mere location of another, with but a slight amount of work performed and more especially, when it is considered that there is a public sentiment among miners that no one shall be permitted to jump such claims with impunity. Under such discouragement, labor and capital are diverted into other channels, and the law relating to mines is in this way made subsidiary, not to the interests of the laborious, enterprising miner, but to those of the idle prospector or the scheming capitalist. It is better to hold that the title to these mines shall be made to depend upon the work to be performed within the statutory limitations, than to put such a construction upon the law as will favor only those who are not laboring diligently and in apt time to develop the riches which lie hidden in the earth.

The same court in *Lockhart et al.* v. *Rollins*, 2 Idaho 540, 21 Pac. 413, 415, said:

> His right of possession does not depend upon any money consideration, but it is a right founded in public policy. It would be clearly against public policy for one to take and hold a mining claim for years, against all others who would be locators, merely that he might

> speculate upon it, with perhaps no design to devolop it. Some guaranty of his good faith is required, as a condition of allowing him such exclusive possession.

In *Hawgood* v. *Emery*, 22 S. D. 573, 119 N. W. 177, the plaintiff and defendant owned two unpatented claims in common. Defendant did work on claims owned in common with plaintiff and in accordance with Title 30, U. S. Code Sec. 28 undertook proceedings to forfeit plaintiff's interest because of plaintiff's failure to contribute his proportion of the cost of the work. Plaintiff brought the action to enjoin the defendant from such forfeiture procedure. Plaintiff offered to prove that he had himself performed assessment work for the two claims in question, his work having been performed on two adjoining claims owned solely by plaintiff and on three adjoining claims owned by plaintiff and third parties. The plaintiff's offer of proof was excluded. The South Dakota Supreme Court said: (P. 178)

> It will be seen, therefore, that the rulings of the court in excluding the testimony sought to be introduced by the plaintiff was error, providing that, under the facts above set forth, the plaintiff would have any right to have his work credited on the claims in litigation.

The court held the work could not be credited, stating the necessity for common ownership of the several claims or of the workings as follows:

> I think it is well settled both by the decision of this court found in *Godfrey* v. *Faust*, 20 S. D. 203, 105 N. W. 460, and under the holdings in 2 Lindley on Mining, Secs. 630-631, together with the long line of authorities cited by our court, and also by Lindley, as well as the authorities cited by both parties of this appeal, that, where a person or persons hold several claims that are adjacent, work can be done on one claim and be credited on the other claims; also, that work can be done outside

of the limits of the claim, and have it credited on such claim where such work is beneficial to the claim, and that this is true even if there are several claims for which credit is asked for said outside work, provided said several claims are held in common; also, that, where there are several claims adjacent held by different persons and work beneficial to all of said claims can best be done on one of them, then, under a proper agreement between the owners of said claims, development work can all be done on one claim, and be credited to the several claims, such work being a part of the general plan or scheme for the development of the several claims.

Lindley on Mines, Third Edition, Section 630, Vol. 2, page 1552, states the rule as follows:

> There must be a community of interest in each claim. This interest need not be of a strictly legal nature, and different owners of adjoining claims can undoubtedly join in an agreement whereby a single shaft may be sunk or a tunnel driven on one of the claims for the joint benefit of the respective claims, even though not owned in common, and this will count as assessment work on all of the claims actually benefited, as being a part of a general plan or scheme of development. But in the absence of such an agreement a cotenant in the group of claims cannot claim for them the benefit of work done by him on another claim or claims in which his co-owner has no interest.

Snyder on Mines, Vol. 1, page 444, Section 480, states the rule as follows:

> • • • Essential to the application of this doctrine, however, there must be a community of interest in the particular development work so that each owns a permanent interest therein, or there must be a community of interest in the claims benefited, and the work done on one for all, or there must be identity of ownership in the work done and the claims benefited, and this must be a bona-fide permanent ownership.

In *Lindley on Mines*, Third Edition, Vol. 2, Sec. 624, pages 1532-1533, it is stated:

> While a timely resumption of work may prevent a relocation, the law contemplates that the labor or improvements, actual and valuable, to the amount of one hundred dollars in each year, computed from the first day of January next succeeding the date of location, should be performed in good faith. There is probably no single provision of the law which is evaded to a greater extent than this one. While, of course, there are many exceptions, the average locator exhausts his ingenuity in attempting to avoid this plain and wholesome requirement. The courts are disposed to deal with these drones in the hive with much more leniency than they deserve. The statute is too frequently applied on sentimental lines. Forfeitures, say these tribunals, are odious, and in many cases the reluctance with which they enforce the law encourages, rather than deters, the systematic evasion of it. * * * It would seem that a more rigid enforcement of the rule would not only command more respect for the law, but would, in a great degree, tend to promote the general object and intent of the mining statutes—the development of the mining resources of the country.

This Petition Presents a Question of General Importance Which Should Be Decided By This Court.

The purpose and policy of the United States statute requiring annual assessment labor is to require the holder of unpatented mining claims to give a substantial guarantee of good faith and to discourage the holding of mining claims without development or intention to develop, to the exclusion of those who might otherwise locate and work the ground. It is to prevent locators from pursuing a dog in the manger policy.

The importance of mining in the public land States is well known. The construction and application of the United

States statute are of outstanding importance throughout these western States. Fundamental questions of title depend thereon. Upon them also will depend whether vital mineral resources shall be developed or remain undeveloped.

To construe the United States statute as the Utah Supreme Court has done is to further liberalize an already liberal statute, defeat its purpose, present unjustified opportunities for abuse and encourage subterfuge and evasion. Under that ruling those who are unwilling to do annual assessment work avoid the necessity by the mere expedient of granting a lease to someone operating on a neighboring property. Large areas can thus be controlled without anything but paper work being done. Monopoly of national mineral resources is thus fostered.

It is respectfully submitted that this Court should decide which interpretation of the United States statute is correct, that of the Interior Department and supreme courts other than Utah, or that of the Supreme Court of Utah. Thus, claimants of unpatented lode mining claims may know what assessment work is necessary and disturbing uncertainty as to mining titles will be avoided.

Conclusion.

Petitioner prays that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 781

SOUTH MERCUR MINING COMPANY, A CORPORATION,
Petitioner,

vs.

NEW MERCUR MINING COMPANY, A CORPORATION, AND THE SNYDER MINES, INCORPORATED, A CORPORATION.

RESPONDENTS' BRIEF

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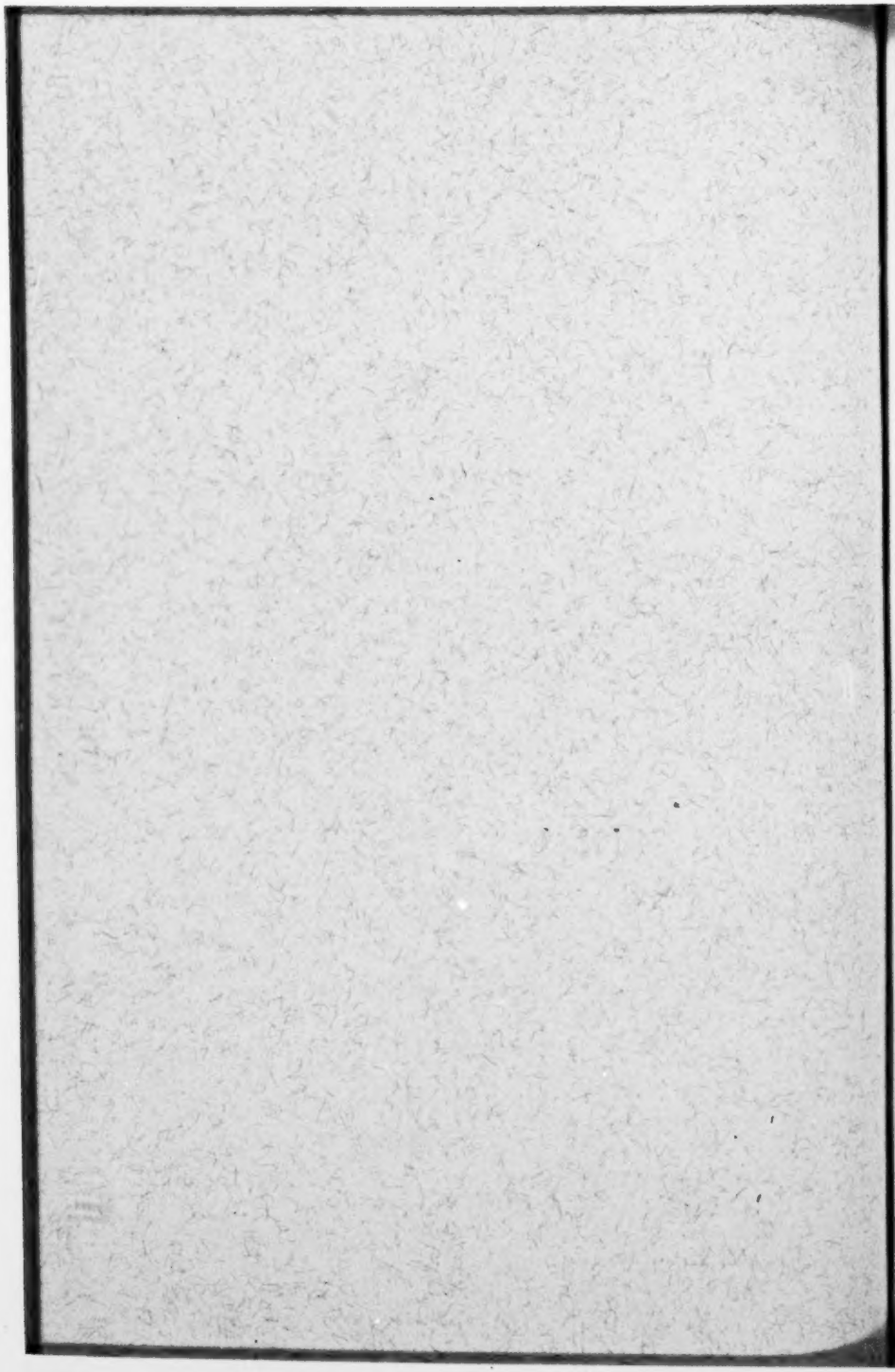

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RESPONDENTS' BRIEF

Statement of Facts

Respondent, New Mercur Mining Company, owns a group of mining claims located at Mercur, Utah. Among this group are 12 unpatented claims, known as the Violet Ray Nos. 1 to 12, inclusive. Respondents claim the right to possession of these 12 claims by virtue of location made in 1931.

Adjoining Respondents' claims on the north is a group of patented mining claims owned by the Consolidated Mercur Gold Mines Company. Traversing the groups of mining claims above mentioned and running in a north and south direction is a mineralized bed or vein containing commercial ores. The Respondent, Snyder Mines, Incorporated, is a min-

ing company operating in the Mercur district and elsewhere in the Western United States. In 1934 Lewiston Peak Mining Company entered into a Lease and Option to Purchase Agreement with the Consolidated Mercur Gold Mines Company, which agreement was later assigned to the said Snyder Mines, Incorporated. (Exhibit 8-A, R-46.) By the terms of this agreement the lessee was given immediate possession of the property with the right to work the same and the right to purchase the same for the sum of $375,000, Five Thousand Dollars of which was paid upon the execution of the agreement and the remaining $370,000 to be paid on or before March 1, 1934.

We find it difficult to fairly present our case before this court because of the meager record which Appellants have filed here. There is no Bill of Exceptions or transcript of the testimony heard by the trial judge and passed upon by the Supreme Court of Utah. Hence, the court is in darkness as to the amount of work performed or moneys paid by the Snyders in carrying out the terms of this Lease and Option. We must assume, however, that the lessee at least made the minimum payments and performed the minimum work as required by said Lease and Option. We call the court's attention to that portion of the agreement (R-51) wherein lessee agrees to perform not less than 150 shifts of labor per month and to expend on or before July 1, 1937, not less than $150,000 in developing and equipping the property. We also call the court's attention to page 51 of the Record wherein the lessee agrees to pay the lessor not less than $1,000 per month either as royalty or as part of the purchase price. We mention these facts to show the substantial minimum interest as shown by the Record that the Snyder Mines, Incorporated has in the Mercur Gold Mines.

On August 28, 1939, the Snyder Mines entered into a Lease and Option Agreement with the New Mercur Company (R-39). By the terms of this agreement the New Mercur Company agreed to sell, and the Snyder Company agreed to purchase, the New Mercur claims above mentioned, including the 12 unpatented claims, for the sum of $100,000, to be paid on or before four years after date of agreement. The Optionee was granted the right of possession to the property and the right to develop and extract the ores therein and was required to perform at least 75 shifts of labor per month

> "either upon the ground hereby leased or in second party's electric tunnel which is being driven towards and is expected soon to reach first party's property, and it is the intention of the parties hereto that the work herein provided for, to the extent that it will be necessary, shall be applied as and for annual assessment work to be done upon the aforesaid unpatented mining claims. The second party shall file proof of labor each year. And, further, second party, on its title to the electric tunnel and the property through which it runs, hereby grants to first party a perpetual easement to work and develop its property through the said electric tunnel, * * *."

On September 1, 1939, Appellants made locations over the 12 Violet Ray claims above mentioned under the name of Protection Claims Nos. 4 and 7 to 15; Appellants claim the right of possession to said claims by virtue of these locations. Upon learning of Appellants' acts the Respondents brought an action in the District Court of Tooele County, State of Utah, against Appellants to quiet title in Respondents to said claims and to oust Appellants therefrom. The trial court found the issues in favor of Respondents and made Findings and Decree (R-12). Appellants then appealed to the Supreme Court of the State of Utah, which rendered

a unanimous opinion affirming the trial court (R-18). Appellants then petitioned this court for a Writ of Certiorari.

Argument

At the time of entering into the Lease and Option with the New Mercur Company, the Snyder Mines was developing the said vein upon the Mercur Consolidated property and was driving toward the New Mercur claims and was virtually on the boundary line between claims of the New Mercur and the Mercur Consolidated.

If we understand appellants' contention correctly, these operations by the Snyder Mines would develop the Violet Ray claims and would satisfy the assessment work for the year 1939, if under the law such operations could be considered as assessment work.

Again we are handicapped in presenting this case because of the lack of a proper record. In order to pass upon the questions involved, this court should know the topography of the country where these mining operations are being performed. It should know the amout of work performed by the Snyder Mines, both upon the claims owned by the New Mercur Company and upon the adjoining claims operated by the Snyder Company. Without the transcript of the testimony this knowledge will not be before the court. We have only meager references in the opinion of our State Supreme Court. We call the court's attention to page 20 of the Record wherein the State Supreme Court said:

> "On trial, the work testified to as having been performed by respondents consisted of four separate and distinct projects. First, the building of a road on to the Violet Ray claims which was begun on August 31, 1939. Second, the clearing and cleaning of several old

tunnel workings on the Consolidated Mercur Gold Mining Company's 'Hillside claim' by the Snyder Mines Incorporated. Third, an extension of the 'electric tunnel' in a southwesterly direction towards the disputed claims. Fourth, an extension of the 'electric tunnel' by leasers under lease No. 259 in a southeasterly direction towards the Violet Ray claims.

"The record is by no means clear as to whether respondents or appellant ordered the road built upon the Violet Ray claims starting August 31, 1939. Appellant introduced evidence of receipts given to it by the superintendent of the construction company in payment for work done. On cross-examination, the superintendent testified, 'I don't know whose road it was.' Respondent's witness, Mr. Wondershek, superintendent of the Snyder Mines Incorporated, testified that he had ordered the work done. The respondents have failed to prove that they built the road. They cannot rely upon such work as satisfying the requirements as to annual asssessment work; nor can the work done on the 'Hillside claim' be regarded as preventing a forfeiture. This work was done after the expiration of the extended assessment period. The same is true as to the work performed in the southwest drift of the 'electric tunnel.' This work did not begin until after September 1, 1939. The preliminary work of cleaning the 'electric tunnel' approach near the southwest drift and laying the track was performed on or about September 1, 1939, but respondents disclaim any benefits which might have arisen therefrom."

If this court is going to review the case it should review all of it. It should know the value of the work performed in building a road upon the Violet Ray claims. It should know the extent and value of the work performed by the Snyders upon the "Hillside claim.' It should know the extent and value of the work performed in the southwestern drift of the electric tunnel. Without such testimony this court is left in the darkness.

We particularly call the court's attention to the fact that the Hillside claim is upon the property owned by the New Mercur Company. (R-40). This work was brushed aside by our State Supreme Court because it was commenced after September 1, 1939. The court failed to realize that the work performed on the Hillside claim was a part of the general plan of development by the Snyder Mines in order to perform the assessment work on the New Mercur property. It is admitted by all that the work in the electric tunnel was commenced before September 1st and if allowable as assessment work was sufficient to meet the requirements of the law. If in following this general plan, the Snyder Company went directly upon the property of the New Mercur Company and performed labor, even though it were after September 1st, still it was a part of the general plan of development and should have been considered as assessment work. The Snyder Company was not obliged to do all of the assessment work in one place. If, in fact, sufficient work was done on the New Mercur property by building the road on the Violet Ray claims and in doing development on the Hillside claims, then the single question presented by Appellants to this court becomes immaterial. If the facts relating to this development work were before the court it might very well conclude that the Supreme Court of Utah was in error.

Appellant challenges the good faith of Respondents and refers to their acts as "dog-in-the-manger policies." We must bear in mind that the Snyder Company had a lease with option to purchase on both the New Mercur claims and the Mercur Consolidated claims and had the sole right of possession to both; we must also remember that the Snyder Company had a very substantial interest and had expended large sums of money in the development of the Mercur Consolidated property, and we must also remember that

the Mercur Consolidated property was being developed by the Snyder Company through what is known as the electric tunnel and that the face of this tunnel on September 1, 1939, was about to enter the property of the New Mercur Company. This court should have before it the testimony of the experts given at the time of trial relating to these matters.

It is well known in mining operations that the most feasible and economical manner of removing ore in the mountainous country of Utah is to drive a tunnel beneath the deposit and then drop the ore to the tunnel level. We believe it is quite generally understood that these mountains have been thoroughly combed and that the time has long since passed when mines are found sticking out of the ground. Discovery of commercial ore bodies today requires deep workings and the expenditure of large sums of money. The prospector or locater is fortunate, indeed, if he can get his property developed by an operator able to penetrate the deep and to intercept hidden treasures that may lie far below the surface.

We believe that the law favors the pooling of interests so that mining properties owned by different parties may be developed by a single operation. This rule, as we understand it, does not go so far as to hold that each owner must contract with each other owner. The rule is satisfied if each owner contracts with a third party to perform such work. The ownership of the property is not so much as the right of possession and the right to develop it. In the instant case the Snyder Company had the exclusive right of possession and the right to develop both the property of the Mercur Consolidated and the New Mercur.

In support of our contentions we particularly refer the court to the opinion of the Utah Supreme Court (R-18) and the cases quoted and referred to therein.

In 2 *Lindley on Mines* (3d Ed.), Sec. 631, it is said: "The rule is well settled that work done outside of a claim or group of claims, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim or claims as if done within the boundaries. One general system may be formed, well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system whether done within or without the claim or claims is work on the claims intended to be developed." And the author continues: "Work done outside of the claim upon another patented claim if for the benefit of the one unpatented, may be considered as work done upon it." "But where improvements not situated upon the claim are alleged to have been made for the development, it must be demonstrated that such improvements have a direct tendency to such development. They must have direct relation to the claim or be in reasonable proximity to it." The author, at pages 1552-1554, Section 630, enumerates other essential conditions: 1. "There must be a community of interest in each claim. This interest need not be of a strictly legal nature, and different owners of adjoining claims can undoubtedly join in an agreement whereby a single shaft may be sunk or a tunnel driven on one of the claims for the joint benefit of the respective claims, even though not owned in common, and this will count as assessment work on all the claims actually benefited, as being a part of a general plan or scheme of development." 2. 'The aggregate amount of the expenditure of money or labor on one claim must equal in value that which would be required on

all the claims if they were separate or independent." 3. "The work performed or improvements made must manifestly tend to the development of all the claims in the group."

In *Jackson* v. *Roby,* 109 U. S.440, 3 S. Ct. 301, 27 L. Ed. 990, it is said: "It often happens that, for the development of a mine upon which several claims are located, expenditures are required exceeding the value of a single claim and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of the different locations to combine and work them as one general claim, and expenditures which may be necessary for the development of all the claims may then be made on one of them. * * * In other words, the law permits a general system to be adopted for adjoining claims held in common and in such case the expenditures required may be made or the labor performed upon any one of them." And see 2 *Lindley on Mines* (3d Ed.), Sec. 631, citing *Harrington* v. *Chambers,* 3 Utah 94, 1 P. 362, and *Nevada Exploration & Min. Co.* v. *Spriggs,* 41 Utah 171, 124 P. 770, it is said: "It is hardly necessary to enumerate the various methods by which mines may be worked under a common system, necessitating the performance of labor or the erection of improvements outside the boundaries of a claim or claims. It is not within the province of the courts to question the judgment of a property owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another. It depends largely upon local environment and the character of the ground to be developed. However, the work must have some reasonable relation or adaptation to its alleged purpose even when performed in good faith, *and such that if continued will lead to the development or discovery of ore in the claims or facilitate the extraction of the ore,*"—citing *Nevada Exploration & Min. Co.* v. *Spriggs,* 41 Utah 171, 124 P. 770. And the author adds:

> Considering the manifest object and purpose of the law requiring annual development work as a condition upon which the locator's estate is to be perpetuated, the courts and the land department will readily discriminate between a bona fide effort to fulfill its requirements and a fraudulent attempt to evade it, and this applies to work done, or pretended to be done, without as well as within the limits of a particular claim or group of claims. The tribunals do not measure a locator's acts by hard and fast lines, but they will readily detect the difference between the genuine and the sham.

Where claims are held in common the expenditures required by the laws of the United States may be made upon any one of the claims. *Rev. St. U. S.*, Sec. 2324 (U. S. Com. St. 1901, p. 1426). The work so done, however, must be done in good faith for the benefit of all the claims, and it must be such as have a tendency to benefit or develop the claims other than the one upon which the work is done. *Big Three Min. & Mill. Co.* v. *Hamilton*, 157 Cal. 130, 107 P. 301, 137 Am. St. Rep. 118. There must be a community of interest in each claim. This interest need not be of a strictly legal nature, and different owners of adjoining claims can undoubtedly join in an agreement whereby a single shaft may be sunk or a tunnel driven on one of the claims for the joint benefit of the respective claims, even though not owned in common, and this will count as assessment on all of the claims actually benefited, as being a part of a general plan or scheme of development. 2 *Lindley on Mines* (3d Ed.), Sec. 630. In *Hawgood* v. *Emery*, 22 S. D. 573, 119 N. W. 177, 133 Am. St. Rep. 941, the court said: "I think it is well settled both by the decision of this court, found in *Godfrey* v. *Faust*, 20 S. D. 203, 105 N. W. 460, and under the holdings in 2 *Lindley on Mining*, Sec. 630-631, together with a long line of authorities cited by our court, and also by Lindley

as well as the authorities cited by both parties on this appeal. that, where a person or persons holds several claims that are adjacent, work can be done on one claim and be credited on the other claim; also, that work can be done outside of the limits of the claim, and have it credited on such claims where such work is beneficial to the claim, and that this is true even if there are several claims for which credit is asked for said outside work, provided said several claims are held in common, also that where there are several claims adjacent held by different persons and work beneficial to all of said claims can best be done on one of them, then, under a proper agreement between the owners of said claims, development work can all be done on one claim, and be credited to the several claims, such work being a part of the general plan or scheme for the development of the several claims." From the foregoing it is apparent that, while there must be an agreement, it is sufficient if there is an agreement on the general plan or scheme; and in *Eberle* v. *Carmichael*, 8 N. M. 169, 42 P. 95, it is held that such an agreement may be by parol. In that case the court said: "The location of the Lexington and Andrew Jackson mines are prima facie valid, and the parol agreement establishing (locations being made in pursuance thereof) a holding in common was sufficiently proven for a jury to pass upon same."

In this case the appellant says: "Furthermore, it does not appear from the record, nor did the lower court find, that the work claimed, even if in fact done for respondent The Snyder Mines Incorporated, was intended in good faith for the development of each of the twelve Violet Ray locations or tended to develop and will benefit each of the twelve Violet Ray locations." A similar objection was made in the case of *Morgan* v. *Myers*, 159 Cal. 187, 113 P. 153. There

the "appellant while on the stand was asked to state whether or not these (claims) had been held as a group," and the appellate court said: "Whether or not these claims were held as a group was best evidenced, not by the intention of the witness, but by the location of the property and the kind, qualities, and place of the work performed." And in *Lind v. Baker,* 31 Cal. App. 2d 631, 88 P. 2d 777, answering a similar objection, held: "In suit to determine title to unpatended quartz mining claims, where a reasonable inference could be drawn from the evidence by trial judge that road work was for the benefit of the claim involved, trial judges finding could not be upset on appeal because he might have drawn a contrary inference from the same evidence."

It is now well settled that the annual expenditure required by the Federal statute to preserve the title to mining claims may be made in work and improvements with the boundaries of the claims themselves, or upon one of a group of contiguous claims, or upon adjacent patented land, or even upon adjacent public land, provided only it is made for the purpose of developing the claim and to facilitate the extraction of ore therefrom. *Copper Mt. M. & S. Co.* v. *Butte & C. Consol. C. & S. M. Co.,* 39 Mont. 487, 104 P. 540, 133 Am. St. Rep. 595. In the same case, the court says: "Counsel for plaintiff contends that it appears that work was done by the plaintiff on the M. L. in good faith for the purpose of developing the group of claims, and that court should not be permitted to substitute its own judgment as to the wisdom or expediency of the method employed by the owner in adapting the plan pursued. As an abstract proposition we think counsel states the correct rule. * * * Nevertheless, the purpose for which the work is alleged to have been done must always be manifested by the relation which

it bears to the claim itself. If the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in the pursuit be conceded." This requirement, that the work or improvement, shall, under the general plan, be manifestly beneficial to the group, is stated in *Morgan* v. *Myers*, 159 Cal. 87, 113 P. 133, as follows: "But it is necessary that the work shall be probably advantageous to all the claims sought to be benefited." In 2 *Lindley on Mines* (3d Ed.), Sec. 631, it is said: "The work performed or improvements made must manifestly tend to the development of all the claims in the group. The burden of proof is on the owner to show that the work done or improvement made does, as a matter of fact, tend to the development of the property as a whole, and that such work is a part of the general scheme of improvement. Such is the rule applied where the work is done outside of the claim for the benefit of an entire group."

The rule could be better expressed it seems to us in negative form, that the particular work in question must not manifestly have no tendency to improve all the claims. We think that all can agree on the application of that rule in certain cases, as in certain cases, as in *Bishop* v. *Baisley*, 28 Or. 119, 41 P. 936, in which it is held that picking rock from the walls of a shaft or from the outcroppings of a ledge, in small quantities from day to day, is not such work as the law will permit the claimant to be credited with upon his account for annual labor performed, for, as was said by the court, such labor does not add to the value of the claim, nor tend to the development of the mine. And, as stated in 2 *Lindley on Mines* (3d Ed.), Sec. 631, "Obviously, a tunnel, the portal of which is situated at a higher elevation than some of the claims in a group and projected in a direc-

tion away from them, could hardly aid in the development of such lower claim." The same is true of the situation in *Gird* v. *California Oil Co.*, 60 F. 531, 542. There credit for assessment work done was claimed for the Whale Oil claim for work done on the Kenyon claim considerably more than a mile away, and between which claims there is a mountain range, and in which the plaintiff's witnesses testified that from the improvement on the Kenyon claim they hoped and expected in years to come to draw oil from the Whale Oil claim, but in fixing the time when this result might be reached they stated that it might be anywhere from ten to a hundred years. The court, in *Morgan* v. *Myers*, 159 Cal. 187, 113 P. 153, stated a similar case as follows: The fact that the mining claims were, according to some of the evidence, separated by a ravine, perhaps had some effect in leading the court to the conclusion that work upon one *would not naturally benefit or have a tendency to uncover the minerals in the other.* In the *Copper Mountain Case,* above cited, the court, referring to *St. Louis Smelting Company v. Kemp,* 104 U. S. 636, 26 L. Ed. 785, said: "The language used by the court evidently means that, if the work done on one of the claims has not reference to the other claims in a group or does not tend to develop all of them in conformity with a general plan adopted with that purpose in view, it cannot be considered as work done upon them as a group or consolidated claim." In the Montana case, "The contention of the plaintiff was, and it undertook to show by its witnesses, that by sinking upon the vein at the point of its interception by the tunnel it could drive a cross-cut or drift under the gulch and thus develop the claims beyond, and that the tunnel had been driven with this end in view;" but the court rejected the plaintiff's contention, and, in effect, catalogued the cases in which it might be held that the assessment work would not "manifestly"

tend to the development of the claims across the gulch, saying:

> Taking into consideration the position of the M. L. claim, with reference to the others in the group; and fact that the tunnel was across the gulch from the others; that it is on a level above the bottom of the gulch; that it extends away from all of the claims in controversy; that it was intended primarily to intercept the vein in the M. L. claim; that it does not appear that this vein traverses any of the other claims or even cross the gulch in their direction; that, in order to render the tunnel available to develop any of them, it will be necessary to sink a shaft or winze to a depth below the level of the gulch and drift to the eastward many hundreds of feet; that to carry out this plan it will be necessary to install heavy and expensive machinery at the collar of the proposed shaft or winze, to raise the ores, and waste and water encountered, to the level of the tunnel in order to convey them to the surface, whereas this could all have been accomplished with less expense and much more convenience by the use of the shaft in the gulch—taking into consideration the whole of the environment, we think the trial court was justified in its conclusion that the forfeiture alleged by the defendant was clearly and satisfactorily established. The conclusion seems unavoidable that the purpose in extending the tunnel was primarily to encounter ore in the M. L. claim, and that it could not reasonably have been intended as a part of any general plan to develop the claims across the gulch or any of them.

The appellant contends that the work in the Electric Tunnel and upon the Hillside claim, or the road work, was not done in good faith, and did not tend to develop or benefit the Violet Ray claims; and especially that the work continued under leases No. 259 and 273 was not shown to have been intended in good faith as a resumption of assessment work for the Violet Ray location. They further contend

that sinking a shaft or incline was a better method of developing the Violet Ray claims.

Earl B. Young, a mining engineer and geologist, testified for the plaintiff as follows: That a tunnel of eight thousand feet is not unusual in mining, and that there are a good many of them in this Western country; that he had participated in discussions in regard to a plan for the development of the Violet Ray claims; that the plan that was discussed more than any other was the plan of extending the Electric Tunnel Southward to develop the Mercur ore bed in the Hillside and Violet Ray groups; that development of ore at the Northwest corner of Violet Ray No. 4 by the extension of a rock tunnel for a minimum distance of some twenty-one hundred feet and a raise of some five hundred feet through rock and barren country was not a practical way in which The Snyder Mines Incorporated would develop this ground. If that was all there was to it, obviously it would be ridiculous to drive that long cross-cut and long raise when a short shaft would get to the same place; but as a matter of fact in the development of a mine you don't take out a very distant object and go for that—you go along step by step and as we go along on this developing of this thing we put up raises to develop our ore body as we go along, more or less feel our way, because it is impossible to see very far into the ground, and what will ultimately happen if there is ore in this part of the world, or will ultimately be the picture, there will be a main haulage level which will be on a level with the Electric Tunnel, and the main ore coming out of the Electric Tunnel and a lot of sublevels in this part of the country, that is the way we will mine if it justifies such a process. It may be several years before we get in that general point. We have been discussing it, but until we get to that point, if there is ore to continue

operation we won't have anything like a twenty-one hundred foot cross-cut through barren country to get to the particular point; we won't have long raises to make because we will already have a large part of that development work done in the development of that ground and additional work we will have to do to get to that particular place—we have been arguing would not be an unreasonable expense. (R. 187, 188.) We are in the mining business primarily to get ore, and the ore bed—this one hundred eighty feet thickness—being so flat its spread over a horizontal distance you can see there, over several hundred feet, it is an easy matter in that one hundred feet to find a place there isn't ore, we want to proceed in ore as much as we can so we are running these two drifts, in fact the third one, we hope to run out with an idea of getting ore. This is a long range program and in the one single objective of getting to this point with the least possible speed that isn't our objective. (R. 198.)

Mr. Young was asked the question: And is it your opinion Mr. Young, that the extension of the Electric Tunnel southerly in that territory will tend to develop the Violet Ray claims and facilitate the discovery and extraction of ore from those claims, and he answered that in his professional opinion it was. And being asked the further question: "Were you also of the opinion that the construction of the road which you pointed out as cutting off from the Sunshine road westerly and a southerly direction and on to the Violet Ray claims would facilitate the development of the Violet Ray claims, and the discovery and extraction of ore from those claims?' The witness answered: "It would help very materially in developing that area;" and "that both methods are feasible and useful." (R. 169-171.)

The appellant did not introduce any evidence along this line so that the respondents' evidence was undisputed. In the same circumstances, the Supreme Court, in *Harrington* v. *Chambers,* 3 Utah 94, 1 P. 362, said: "There is nowhere in the whole case the least intimation that the work done, or that proposed, was located in bad faith, or that it was in any way a subterfuge, or that there had ever been any contrary statement or claim than the one now set forth and relied upon; on the contrary, there is uncontradicted testimony that it was all done in the utmost good faith, as is evidenced, among other things, by the character and permanency of the work, and the large amount of money expended." In *Eberle* v. *Carmichael,* 8 N. M. 169, 42 P. 95, the court said: "The testimony on these points being uncontradicted, was sufficient to carry plaintiff's case to the jury, if, in law, he had a locus standi." In *Temescal Oil Min. & Devel. Co.* v. *Salcido,* 137 Cal. 221, 69 P. 1010, the court said: "In the absence of any evidence to the contrary (and there seems to have been none), it will be presumed that this work was all done with the honest purpose of renewing work 'after failure, and before location, so as to satisfy the provisions of Section 2324, Rev. Sts. U. S." And in *Justice Min. Co.* v. *Barclay,* 82 F. 554, the court said: "Testimony although criticized and questioned by respondent's counsel, is undisputed."

There are many authorities holding that it is not within the province of the court to question the judgment of a property owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another. In *40 C. J.,* 832, Note 88, citing *Meihlich* v. *Tintic Standard Mine. Co.,* 60 Utah 569, 211 P. 686, it is said: "Work done on one of a group of contiguous mining claims under common ownership for the benefit of all in the most practical way,

from the standpoint of an experienced and practical miner, to intercept veins and ore channels, satisfies the requirement of the statute despite testimony of expert geologists to the contrary, especially where the result is the finding of ores in large quantities." In *Big Three Min. & Mill. Co.* v. *Hamilton,* 157 Cal. 130, 107 P. 301, 137 Am. St. Rep. 118, it was said: "Work done on one of a group of mining claims which has a tendency to develop or benefit all of the claims in the said group inures to the benefit of each and all of said claims, even though the system adopted may not be the best that could have been devised under the circumstances." In *Yreka Min. & Mill. Co.* v. *Knight,* 133 Cal. 544, 65 P. 1091, the court said: "The superintendent testified that the work was intended to develop the whole group of mines, and he gave his reasons for believing that the work tended to develop the Ada. There was some evidence corroborative of this testimony. Defendant introduced witnesses who testified, in effect, that the work done could not, in their opinion, be of the slightest benefit to the Ada claim, nor in any way tend to develop it. The jury might well have taken this view of the evidence but we cannot say that the evidence was insufficient to warrant the conclusion to which the jury came. The evidence on the point was in conflict, and under the well-settled rule we cannot interfere with the verdict." And in *Love* v. *Mt. Oddie United Mines Co.,* 43 Nev. 61, 184 P. 921, it is said that "in the exercise of judgment as to where development work should be done on a group of mining claims and locations, a wide latitude should be allowed the owner of the property."

There can be no question in this case that there was an agreement between the respondents for the doing of the work in question, and one which is properly described as a general plan or scheme (Ex. 6); and which agreement,

paragraph 2 (a), provided that the labor may be performed by the second party (The Snyder Mines Incorporated) either upon the ground hereby leased or in second party's Electric Tunnel which is being driven toward and is expected soon to reach first party's property. In the *Spriggs Case*, hereinbefore cited, the court stated the test to be, that the work, as it is commenced on the ground, appears to be such that, if continued, will lead to a discovery and development of the veins or ore bodies that are supposed to be on the claim; while in the case of *Hain* v. *Mattes*, 34 Colo. 343, 83 P. 127, the court regarded it as sufficient that the work *eventually* reached the outlying claims. In the case of *Anvil Hydraulic & Drainage Co.* v. *Code* (C. C. A.), 182 F. 203, it is said: "All the conflicting testimony in the case related to the question whether or not the drain *when completed* would be of benefit to the claim. The submission of the question to the jury could only have been done upon the theory that the jury were to consider the effect of the drain *when completed*. If the inquiry had been only as to the value of the claim of an uncompleted drain two miles distant, there could have been no question for the jury to consider, and the court would have ruled as a matter of law that such improvement was of no possible value to the claim. That such was the understanding of the court and jury is made clear by the fact that elsewhere in the instructions the court defined the expression 'work of benefit or value' to the claim, which had been used in the charge, and said it meant 'work which tends either to enhance the value of the claim in dollars and cents, or which is of use in prospecting, developing or operating the claim as a mining claim.' It goes without saying that a drain two miles away from a placer claim, without an intention to extend it, does not tend in any way to enhance the money value of that claim and is of no use whatever in prospecting, developing, or

operating it. On the other hand, it is conceivable that such a drain thus begun under a definite plan for its extension to a series of claims might, *when completed,* be of great benefit and value to each. In such a case work done at a distance from any one of the claims might be reckoned as assessment work thereon, since it would tend to its benefit or improvement."

The foregoing cases state, to our mind, the test for the determination of the question whether certain work benefits or tends to develop a groups of claims. In *1 Snyder on Mines,* sec. 498, p. 470, the proposition is stated as follows: "The labor required by the statute (U. S. Rev. Sts, sec. 2324) may be performed on or off the claim or group of claims so that it tends to develop and to facilitate the extraction of ore and may consist in any act or work necessary for that purpose, whether it be the running of a tunnel, sinking a shaft, constructing a road in certain cases, the constructing a ditch to convey water or carry off debris, or in short any act, work, or improvement, which will in its natural and obvious effect enhance the value of the claim and tend towards the development and facilitate the extraction of the mineral it contains." In *2 Lindley on Mines* (3d Ed.) sec. 629, citing *Bishop v. Baisley,* 28 Or. 119, 41 P. 936, the rule is stated negatively as follows, that "Such labor does not add to the value of the claim, nor does it tend to the development of the mine." The court in the *Bishop Case* had reference to picking rock from the walls of a shaft and other trifling work.

The assessment work may be done by leasers; and we think there are no cases showing that a general plan for the development of claims must go on without change. The fact that the owner or leaser does stoping in the progress of the work does not affect it as assessment work. *Taylor* v.

Parentau, 23 Colo. 368, 48 P. 505. The fact that the general plan related, in the first instance, to a few claims, does not mean that it cannot be expanded to include other claims; and so, in *Harrington* v. *Chambers,* 3 Utah 93, 1 P. 362, it is said: "The language of the court in *Mt. Diablo M. & M. Co.* v. *Callison,* 5 Sawy. 439, is applicable to the facts in this case. In that case the court says 'work done outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed, well adapted, and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it. A general system of work for the exploration of the whole ground embraced in these three sets of contiguous claims seems to have been carried on by the plaintiff, and we think all work done was a part of that general system, and as such applicable to *all the claims which had by purchase been concentrated in a single party, the plaintiff.*' "

The matter is well illustrated in the case of *Justice Min. Co.* v. *Barclay,* 82 F. 554. The facts of that case are stated in the opinion as follows: "The title of complainant to both of these claims as patented is admitted by the respondents, but they deny that either of said lodes includes any part of the mining ground, lode, claim, or premises lying between the Easterly sideline of the Justice patented claim and the Westerly sideline of the Woodville patented claim. On April 27, 1895, complainant leased to George Hobard, Charles H. Steele, and respondents Thomas Bell and C. Benham, for the period of one year, the mining ground 'commencing at the trestle leading from the Justice Company's tunnel to the Washoe Mill and running thence in a Southerly direc-

tion, following the course of Gold Canon, the South boundary line of the Justice claim, and extending from the line of the Devil's Gate toll road Easterly to the East line of said Justice Mining Company's claim," upon an agreed royalty or percentage of the value of the ore extracted. Steele and Hobart testified that, after the lease was executed, the superintendent of the Justice informed them that they could work as far East as the Justice claim, or as far East as they pleased. Respondents Bell and Benham testified that the lease is only intended for the main Justice lode within the Justice patented lines." It further stated, that in support of complainant's right to recover herein, it is alleged, "that while the respondents Charles Benham and Thomas Bell were in possession of and working in the lode within the Justice ground, as tenants of complainant, the other respondents herein, on January 1, 1896, conspired with them, and made a pretended location of a portion of said ground between the Justice and Woodville patented locations in the name of W. P. Hills, but for the use and benefit of the other respondents." The court, in the course of its opinion, said:

> No work was ever done by the complainant within the surface lines of the Cummings location. But it claims to have expended during the year 1895 over $3,000.00 for the purpose of holding the Cummings and six other claims, to which it has title. This claim is partly based upon the theory that, inasmuch as the Cummings claim is contiguous to the Justice, work done upon the Justice within the patented line would inure to the benefit of the Cummings, and constitute compliance with the provisions of the law requiring a certain amount of work upon unpatented claims to be performed every year; and, further, upon the ground that certain work performed by some of the respondents as lessees of complainant was for the purpose of saving it "a cash expenditure of money for the purpose

of assessment on different claims,' including the Cummings; and that this was the principal object of making the lease.

It appears from the evidence that some five or six locations were made at the same time, or about the same time, as the Cummings, all being in proximity with each other. The plain inference to be drawn from all the testimony is that these locations were made at the instance and request and for the use and benefit of the Woodville Company, evidently for the purpose of protecting the Woodville claim. * * * It is not shown that any work was done by the Woodville Company on any of the six claims independent of the work that was being conducted and carried on by it within the surface limit of the Woodville patented claim. Owing to controversy which thereafter arose between the Justice and the Woodville as to whether both claims were not upon the same lode, or from other causes, the Woodville Company became involved, and all its property, including the Cummings ground, was sold under execution, and the Justice Company thereafter obtained the title to all of the property. The Justice never performed any work upon the ground within the surface limits of the Cummings location, or any work for its benefit, save such as was performed in the regular course of work upon the Justice lode within the surface limits of the Justice patented claim.

Conceding, for the purpose of this opinion, that complainant had failed to do any assessment work upon the ground, and that it was prior to January 1, 1895, subject to be relocated, still the respondents are not in a position to take advantage of such failure on the part of the complainant to do the assessment work. The evidence is direct and positive that the object of the lease, as executed by complainant, was for the express purpose of performing enough work to hold the Cummings and the other claims lying outside of the patented lines of the Justice and Woodville.

> In order to comply with the law, it was not necessary that the assessment work should be done upon the surface of the claim. It may be done on the surface or beneath the surface, and this would be sufficient although it might be that the work was performed on a lode having its apex outside of such surface lines. *Mining Company v. Callison,* 5 Sawy. 439, Fed Cas. No. 9,886. It may be done on other claims or upon other ground, where as here, it is in reasonable proximity to it; and if the work, as done, would be beneficial, and tend to the *future development* or improvement of the claim, it is sufficient.
>
> Where the work is not done within the surface boundaries of the location, the law undoubtedly casts the burden upon the party claiming to have done the work, not only to show that the work done outside of such boundaries was intended as the annual assessment work on the claim, but that it was of such a character as that it would inure to the benefit of such claim. But, when such facts are clearly established, then it is wholly immaterial whether the work to accomplish such purpose was performed off the ground upon a patented or unpatented mining claim.

See also *Peachy* v. *Gaddis,* 14 Ariz. 215, 127 P. 739 and *Clarke v. Mallory,* 22 Cal. App. 2d 55, 70 P. 2d 664, for cases in which the assessment work was performed by leasers.

"Roadways are necessities, and where such have been constructed on the claim for the manifest purpose of assisting in the development of the mine, such as transporting machinery and material to and or from the mine, it is a legitimate expenditure." *2 Lindley on Mines* (3d Ed.) sec. 629, p. 1544. See, also, *Lind* v. *Baker,* 31 Cal. Appfl 2d, 88 P. 2d 777; *Godfrey v. Faust,* 18 S. D. 567, 101 N. W. 718; 20 S. D. 203, 105 N. W. 460; *Plough v. Nelson,* 49 Utah 35, 161 P. 1134. At the trial of this case there was some dispute

as to whether the respondents contracted for the construction of the so called Sunshine road, but the trial court decided that issue in favor of the respondent, and its decision is binding. A dispute of the same kind arose in the case of *Pueblo Quarries* v. *Clark* (Colo.), 110 P. 2d 1115. It is apparent from the record that if it had been necessary and proper, the appellant would have claimed credit for the same work.

The decision of the Supreme Court of Utah very carefully confines the doctrines of the case to the facts before the court. No one seeking to defeat the purpose of the law, to hold claims by "paper work," or by "dog-in-the-manger" tactics, will derive comfort from the decision.

It is noted that the authority cited by petitioner emphasizes the element of good faith. The record brought up by petitioner, and petitioner's brief are suggestive of bad faith, and that the Supreme Court of Utah erred in not finding and deciding that respondents were guilty of bad faith.

There is not, however, in the record any of the evidence upon which the Utah court bases its judgment; and without such evidence the decision of that court that the repsondents were engaged in a good faith endeavor to develop the mineral resources of the territory involved, cannot be brought in question.

On the authority of *McArthur* v. *United States,* 315 U. S. 787, 62 S. Ct. 915; *United States* v. *N. E. Rosenblum Truck Lines, Inc.,* 315 U. S. 50, 62 S. Ct. 445; *Lubetich v. United States,* 315 U. S. 57, 62 S. Ct. 449, we ask that the petition for writ of certiorari be denied.

We find it difficult to believe that this court will indulge the assumptions necessary to hold that the Utah court either ignored or was blind to such principles. Rather, we think

it safer to assume that, the Utah courts, with the complete factual background before them, deliberately decided that of the two contestants the respondents, and not the petitioner, were more likely to develop the mineral resources of the territory involved, and thus serve a sound public policy.

No apology is made for the decision and judgment of the Supreme Court of Utah, nor do we think it stands in need of extrinsic support. Neither do we find in the authority cited by petitioner anything inconsistent with the decision, or anything that was not called to the attention of the court.

We are mindful, too, of the oft reiterated rule that this court will affirm a judgment sustainable on any ground, even though a wrong reason may have been given; limited to the record brought up by petitioner, respondents would be denied the right to a determination whether this is such a case.

WHEREFORE, the respondents pray that this Honorable Court will deny the petition for writ of Certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 781

SOUTH MERCUR MINING COMPANY, A CORPORATION,
Petitioner,

vs.

NEW MERCUR MINING COMPANY, A CORPORATION, AND THE SNYDER MINES, INCORPORATED, A CORPORATION.

PETITIONER'S REPLY BRIEF

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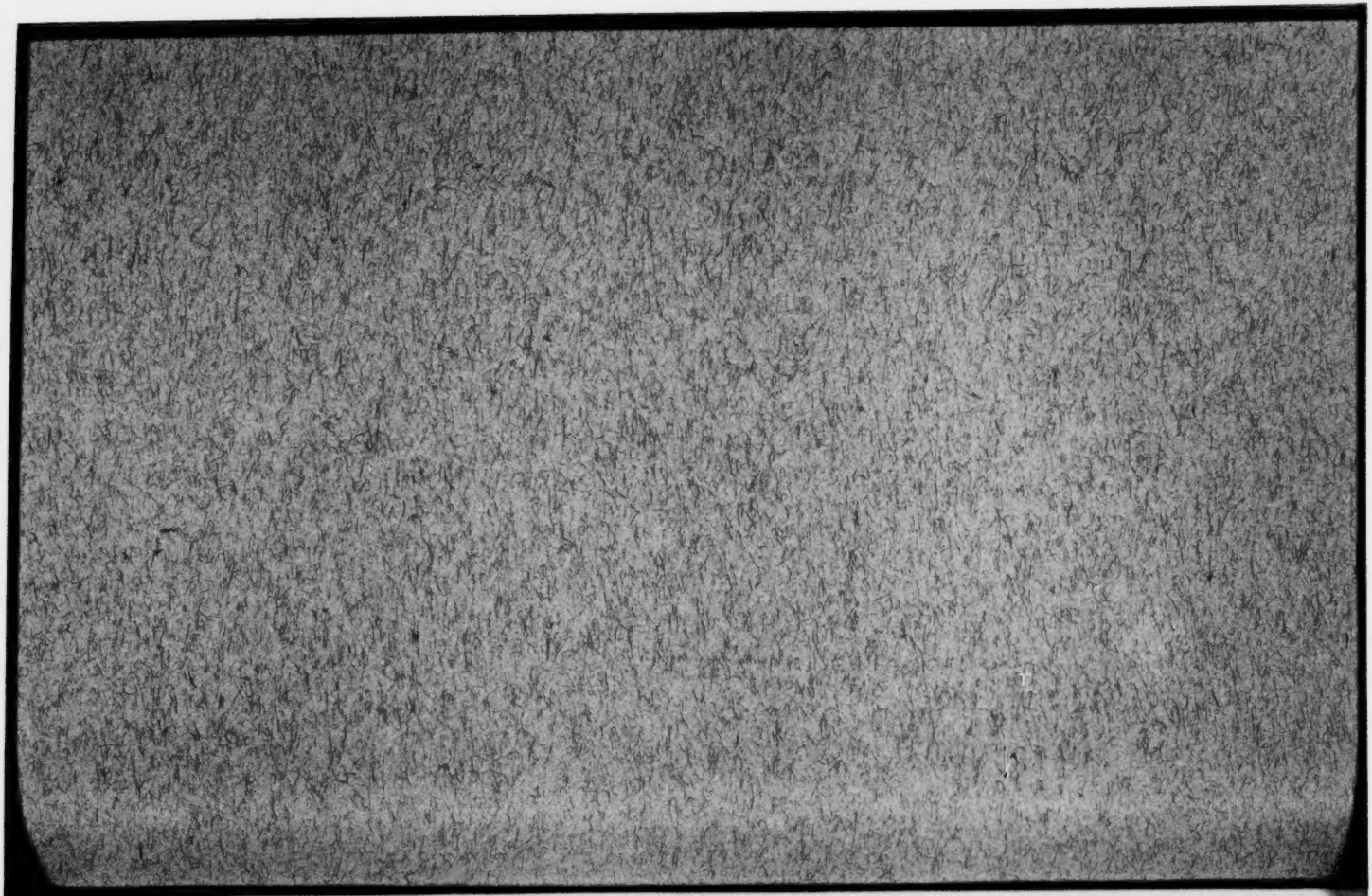

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NEW MERCUR MINING COMPANY, A CORPORATION, AND THE SNYDER MINES, INCORPORATED, A CORPORATION.

PETITIONER'S REPLY BRIEF

The decision of the Utah Supreme Court which petitioner seeks to have reviewed is expressly and clearly based upon its conclusion as a matter of law that the requirements of the U. S. Statute (U. S. Code, Title 30, Sec. 28) as to annual assessment labor were satisfied as to the unpatented Violet Ray mining locations owned by one party, (respondent New Mercur Mining Company), by work done by a second party, (respondent The Snyder Mines, Incorporated), in mine workings

and on nearby patented mining claims owned by a third party, (Consolidated Mercur Gold Mines Company), although there was no contractual relationship of any sort between the owner of the Violet Ray mining locations and the owner of the patented claims and workings thereon.

The petition in this case expressly and clearly seeks a review of the question of whether the Federal Statute can be so construed.

The Utah Supreme Court conceded that its ruling was "not free from doubt" (R. 26). It seems apparent from respondents' brief that they entertain doubt as to the soundness of the Utah Court's decision, and respondents' brief attempts to confuse the question clearly raised by the Utah Court's decision and presented by the petition.

Respondents complain of an inadequacy of the record, not to enable this Court to determine the question presented by the petition, but to enable this Court to disagree with the Utah Supreme Court's findings of fact and thus support the result of the Utah Court's decision regardless of the error in its construction of the Federal Statute. This seems to be nothing but a criticism that the record does not contain evidence which would enable this Court to review issues which are only factual and involve no question as to the proper construction of the Federal Statute. Respondents were served with petitioner's praecipe on February 20, 1943, but did not then or thereafter, nor do they now, seek to have the record enlarged.

Respondents discuss facts and evidence which are not in the record and not necessary for consideration of the question of law raised by the petition. Thus, on pages 2 and 3 of

their brief they discuss the amount of their asserted expenditures in operating under a lease (Exhibit 8-A) on other property. It is submitted that this is wholly immaterial to the question of construction of the Federal Statute. So also, on pages 4 to 6, they discuss work alleged to have been performed as to which the Utah Supreme Court expressly found against them (R. 21). So also, on pages 11 to 21, they discuss whether the workings in question could benefit, or tend to benefit the claims in question, but the question presented by the petition presupposes such possibility of benefit. Respondents have not pointed out any material question or issue as to which the record is inadequate.

Respondents' brief discloses that they are dissatisfied with certain findings of fact made by the Utah Supreme Court (R. 21) but they did not petition the Utah Court for a rehearing, and no Federal question for the consideration of this Court is involved in those findings.

Respondents, in their brief, cite texts and authorities uniformly setting out the necessity of common ownership to the applicability of group work, but no authority which will sustain the holding of this case that work performed in workings off the unpatented claims in question suffices as annual assessment work to hold these unpatented claims where there is no common ownership of the property where the work was performed and the unpatented claims for which the work is asserted, and no community of interest in the workings which makes it possible for the owner of the unpatented claims to extend and use such workings for the development of the unpatented claims.

Respondents, on pages 19 and 20 of their brief, discuss an agreement between the respondents, but ignore the entire

want of any agreement between New Mercur Mining Company, the owner of the unpatented Violet Ray claims, and Consolidated Mercur Gold Mines Company, the owner of the patented claims, through which agreement alone common ownership in the claims or the workings could arise.

On page 26 of their brief respondents cite *McArthur* v. *United States*, 315 U. S. 787, 62 S. Ct. 915; *United States* v. *N. E. Rosenblum Truck Lines, Inc.*, 315 U. S. 50, 62 S. Ct. 445; and *Lubetich* v. *United States*, 315 U. S. 57, 62 S. Ct. 449, as requiring denial of the petition. We submit that those cases, under the Motor Carrier Act, are entirely irrelevant and inapplicable.

The existence in this petition of a Federal question of general importance is undisputed by respondents.

Respectfully submitted,

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